(16)

No. 00-38-CFH Title: John D. Ashcroft, Attorney General, et al., Petitioners
v.
Kim H. Ma

Docketed:
July 6, 2000 Court: United States Court of Appeals for the Ninth Circuit

Vide:
99-7791

Entry	Date	Proceedings and Orders
	Nov 1 1999	Application (99A359) for a stay of order of the United States District Court for the Western District of Washington pending appeal, submitted to Justice O'Connor.
	Nov 2 1999	Response to application (99A359) from Kim Ho Ma requested by Justice O'Connor, due November 9, 1999.
	Nov 2 1999	(99A359)Temporary stay entered by Justice O'Connor pending receipt of a response and further order of the undersigned or of the court.
	Nov 9 1999	Response to application (99A359) filed by Kim Ho Ma.
	Nov 10 1999	Application (99A359) referred to the Court by Justice O'Connor.
	Nov 10 1999	(99A359)Reply Memorandum in Support of Application for Stay filed.
	Nov 12 1999	(99A359)Response to Reply Memorandum in support of Application for Stay
	Nov 12 1999	Application (99A359) denied by the Court.
	Jul 5 2000	Petition for writ of certiorari filed. (Response due September 1, 2000)
	Jul 5 2000	Lodging by United States filed.
	Jul 26 2000	Order extending time to file response to petition until September 1, 2000.
	Aug 7 2000	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
	Aug 31 2000	Brief of respondent Kim Ho Ma in opposition filed.
	Aug 31 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Aug 31 2000	Respondent's response to petitioners'lodged documentfiled.
	Sep 13 2000	DISTRIBUTED for Conference of October 6, 2000
	Sep 20 2000	Reply brief of petitioners Janet Reno, Attorney General, et al. filed.
	Oct 4 2000	Letter and attachment received from counsel for the respondent and distributed.
	Oct 10 2000	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
	Oct 10 2000	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Oct 10 2000	Petition GRANTED. The case is consolidated with No. 99-7791, Zadvydas v. Underdown, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT February 21, 2001.

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2 pp

No. 00-38-CFH

Entry	Date	Proceedings and Orders
	Nov 24 2000	Joint appendix filed.
	Nov 24 2000	LODGING consisting of ten copies of four letters from Dept. of Justice to Congress submitted by the Solicitor General.
	Nov 24 2000	Brief of petitioners Janet Reno, Attorney General, et al. filed.
	Dec 12 2000	Motion of respondent Ma and petitioner Zadvydas for additional time for oral argument and for divided argument filed.
	Dec 21 2000	Brief amici curiae of Catholic Legal Immigration Network, Inc., et al. filed. VIDED.
	Dec 22 2000	Brief of respondent Kim Ho Ma filed.
	Dec 22 2000	Brief amici curiae of American Association of Jews from the Former USSR, et al. filed.
	Dec 26 2000	Record filed.
	Dec 26 2000	Brief amicus curiae of Lawyers Committee for Human Rights filed.
	Dec 26 2000	Brief amici curiae of Carolyn Patty Blum, et al. filed.
	Dec 26 2000	LODGING consisting of twenty bound copies of documents submitted by counsel for Catholic Legal Immigration Network, et al.
	Dec 26 2000	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Dec 26 2000	Brief amici curiae of Human Rights Watch, et al. filed.
	Jan 2 2001	Record filed.
	Jan 18 2001	CIRCULATED.
	Jan 22 2001	Motion of respondent Ma and petitioner Zadvydas for additional time for oral argument and for divided argument GRANTED.
	Jan 29 2001	Reply brief of petitioners Eric Holder, Acting Attorney General, et al. filed.
	Feb 2 2001	Letter and Sixth Circuit decision received from the Solicitor General and distributed. VIDED.
	Feb 21 2001	ARGUED.

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

JANET RENO, ET AL., PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during that 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released, and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Attorney General of the United States, the Immigration and Naturalization Service (INS), and the INS Acting District Director in Seattle, Washington. The three petitioners were named as defendants in the district court and were appellants in the court of appeals. Respondent is Kim Ho Ma, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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In the Supreme Court of the United States

No.

JANET RENO, ET AL., PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General and the other federal petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 208 F.3d 815. The July 9, 1999, joint order of five district court judges in this case and four other cases (App., *infra*, 34a-51a) is reported at 56 F. Supp. 2d 1149. The July 13, 1999, opinion of the district court ordering an evidentiary hearing in respondent's case (App., *infra*, 52a-54a) is reported at 56 F. Supp. 2d 1165. The September 29, 1999, opinion of the district court granting respondent habeas relief (App., *infra*, 55a-61a) is not reported. The June 2, 1999, custody decision by the Immigration and Naturalization Service (INS) District Director and the underlying May 6, 1999, custody review report (App., *infra*, 77a-86a) are not reported. The September 29, 1999, custody decision of the

INS headquarters review committee (App., *infra*, 87a-89a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2000. A petition for rehearing was denied on June 2, 2000 (App., *infra*, 62a-63a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1231(a) of Title 8 of the United States Code provides, in relevant part:

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

* * * * *

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section

1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration official periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal

period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

2. The regulations of the Immigration and Naturalization Service that currently govern the detention of aliens beyond the 90-day removal period, 8 C.F.R. 241.4, are set forth at App., *infra*, 90a-91a.

3. The February 3, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," is set forth at App., *infra*, 64a-68a. The August 6, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors entitled "Interim Changes and Instructions for Conduct of Post-order Custody Reviews," is set forth at App., *infra*, 69a-76a.

STATEMENT

1. a. Respondent is a native and citizen of Cambodia who entered the United States as a refugee in 1985 and became a lawful permanent resident in 1987. App., *infra*, 56a. In 1996, respondent was convicted in state court of first degree manslaughter after he, along with four other gang members, "ambushed and shot a fellow gang member" in April of 1995. *Ibid.*; A.R. 8-9, 144.[1] Respondent was sentenced to three years and two months' imprisonment. App., *infra*, 60a n.4.

b. On June 6, 1997, respondent was released from state custody and, pursuant to a detainer previously lodged by the INS, was transferred to INS custody and ordered detained. A.R. 48, 194, 249. On July 3, 1997, the INS issued respondent a notice to appear, charging him with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)

[1] A.R. refers to the certified Administrative Record filed by the INS in the district court.

because he had been convicted of an "aggravated felony," which includes a crime of violence for which the term of imprisonment imposed was one year or more, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998). A.R. 36, 186.

On September 12, 1997, an immigration judge found that respondent was subject to removal as charged and was ineligible for asylum and withholding of removal. A.R. 63-69. Respondent appealed that ruling to the Board of Immigration Appeals (Board), which denied relief. A.R. 4-10. In an opinion dated October 26, 1998, the Board agreed that respondent was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). A.R. 4-5. The Board further held that respondent was ineligible for withholding of removal under 8 U.S.C. 1231(b)(3)(B)(ii) (Supp. IV 1998), which precludes such relief if "the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States." A.R. 4-5. The Board agreed with the immigration judge that respondent's conviction for participating in "a gang related violent ambush resulting in the death of [the] victim constitutes a particularly serious crime" (*id.* at 9), noting, *inter alia*, that he "received almost the maximum sentence that could be ordered based on his criminal record" (*id.* at 8).

c. During the pendency of his removal proceedings, respondent twice requested redetermination of the denial of his request for release on bond. On October 7, 1997 (A.R. 83-88), and December 31, 1997 (A.R. 35-41), the immigration judge denied those requests. The immigration judge determined that respondent's detention was authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, §303(b)(3)(B), 110 Stat. 3009-587—the transitional period custody rules, which authorized the Attorney General to release a lawfully admitted alien in respondent's circumstances only if the alien "satisfies the Attorney General that the alien will not pose a

danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings." A.R. 39, 87. The immigration judge determined that respondent "would be a danger to the community if he is released," based, *inter alia*, on a psychological evaluation of respondent stating that he "exhibited little insight, denied any knowledge of the instant offense, and said he was not involved in any gang activity despite information to the contrary." *Id.* at 40.[2] The immigration judge also pointed to respondent's lack of credibility in denying that he abused drugs and found "nothing in the respondent's file to indicate that he was rehabilitated." *Ibid.*[3]

2. a. Respondent's order of removal became final on October 26, 1998. The final order of removal extinguished respondent's status as a lawful permanent resident and eliminated any legal right of respondent to remain in this country. See 8 U.S.C. 1101(a)(20); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. IV 1998); 8 C.F.R. 1.1(p). When the order became final, the INS began the process to remove respondent to Cambodia. By letter dated May 5, 1999, the United States requested travel documents for respondent from the Cambodian government. App., *infra*, 58a.

During the 90-day period following the issuance of respondent's final removal order, respondent was detained by the INS pursuant to 8 U.S.C. 1231(a)(2) (Supp. IV 1998). That

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[2] The report explained that "[p]olice reports indicate that [respondent] had been associated with the gang and its members for some time" and that "he was arrested at least twice [before that offense] with one of his codefendants on this case." A.R. 50.

[3] In addition, while respondent was in INS detention, he had to be transferred to another detention facility "[d]ue to behavior problems." A.R. 226. In a declaration in support of his request to be transferred to another facility where other INS detainees were housed, respondent acknowledged that he could "almost understand why the immigration judge may not want to release [him] on a bond." A.R. 231.

section mandates detention, during the 90-day period following entry of a final order, of an alien who, *inter alia*, has been found removable based on a conviction for an aggravated felony.

b. The INS was not able to remove respondent to Cambodia within the 90-day period following entry of his final removal order. Upon expiration of that period on January 24, 1999, respondent was no longer subject to mandatory detention. Instead, he was thereafter detained pursuant to 8 U.S.C. 1231(a)(6) (Supp. IV 1998), which authorizes the detention of an alien who, *inter alia*, has been found removable based on a conviction of an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

Respondent's continued detention under 8 U.S.C. 1231(a)(6) is subject to periodic review under the governing INS regulations, 8 C.F.R. 241.4, and implementing directives. See App., *infra*, 64a-68a, 90a-91a. By memorandum dated February 3, 1999, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," the Executive Associate Commissioner of the INS "clarifie[d] the authority of [INS] District Directors to make release decisions and emphasize[d] the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(2) (Supp. IV 1998)]." App., *infra*, 64a. The first periodic review mandated by INS procedures is during the 90-day removal period. *Ibid.* Thereafter, a detainee's custody status is automatically reviewed on a periodic basis "to determine whether there has been a change in circumstances that would support a release decision since the 90 day review." *Id.* at 66a.

The INS conducted its first periodic review of respondent's custody in May 1999. That review included an interview of respondent and consideration of supporting documentary material submitted by his family and friends. App., *infra*, 77a-86a. On June 2, 1999, the INS notified respondent that it had decided to continue to detain him, based on a consideration of the factors set forth in the governing regulations and all material submitted by respondent during the review process. *Ibid.* That notice detailed the statement made by respondent and his attorney, as well as the evidence submitted by respondent concerning his family ties, but also noted, under "Community Concerns," that respondent "was a member of the 'Local Asian Boyz' (LAB) in the Seattle area and was convicted of Manslaughter in the 1st Degree." *Id.* at 80a. It also noted that respondent had to be transferred to a different detention facility because of conduct while in INS custody. *Ibid.*

The notice informed respondent that his custody would be subject to review again on December 2, 1999. It also informed respondent that he could, at any time, request a redetermination of his custody status, if supported by evidence that he would appear at all future immigration proceedings and that he would not pose a threat to the community. App., *infra*, 78a.

3. Meanwhile, on February 2, 1999, respondent had filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, in the United States District Court for the Western District of Washington. A.R. 208-214. Respondent contended that his native country of Cambodia refused to accept him and that there was no INS panel to review his detention, which, he maintained, rendered his detention indefinite and unconstitutional. *Id.* at 211. Respondent's case was one of approximately 100 such cases then pending in the Western District of Washington.

a. On July 9, 1999, five judges of the district court issued a joint order in respondent's case and four other "lead" cases. App., *infra*, 34a-51a. The judges addressed the cases jointly because they involved substantive and procedural due process challenges similar to those brought by a large number of aliens who were in INS detention in that district following final orders of removal and whose immediate removal was not then possible. *Id.* at 35a. The court did not, however, question that 8 U.S.C. 1231(a)(6) (Supp. IV 1998) authorizes the continued detention of such aliens as a statutory matter. App., *infra*, 38a.

The five-judge panel's joint order established a framework for analyzing an individual habeas petitioner's claim that his detention violates substantive due process. It first rejected the government's submission that the interest of respondent and the other habeas petitioners is the interest in being released into the United States pending their removal. In the panel's view, their interest is, more broadly, a "fundamental liberty interest in being free from incarceration," which requires "strict scrutiny" of any decision to detain aliens in respondent's position. App., *infra*, 43a-44a. The panel rejected the government's argument that a more deferential standard should apply because of the plenary power of the Legislative and Executive Branches over immigration matters, holding that such deference does not extend to detention following a final order of removal. *Id.* at 45a.

Applying strict scrutiny, the five-judge panel acknowledged that detention of aliens such as respondent furthers the permissible governmental interest in securing the safe removal of aliens and the incidental goals of preventing flight and protecting the public from dangerous felons. App., *infra*, 46a. In the panel's view, then, the substantive due process question turns on whether the detention is excessive in relation to those goals. *Id.* at 47a. Resolution of that question, it explained, requires a court to "balance the likeli-

hood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." *Ibid.* The panel noted that the government's interest in detention decreases as the probability of removal of the alien decreases, concluding that it would be excessive "to detain an alien indefinitely if deportation will never occur." *Ibid.* Application of the substantive due process test was left to each judge in each individual case. *Ibid.*

The five-judge panel then turned to the procedural due process question. It reasoned that, if there is no substantive due process violation with respect to a particular alien under the framework it announced, it must be determined whether the procedures for detention of the alien are adequate. App., *infra*, 48a. The panel held that the procedures under which INS District Directors made release decisions—based on a review of the administrative file, the alien's written submission or an interview with the alien, and consideration of the criteria identified in 8 C.F.R. 241.4—did not satisfy due process because, in its view, the INS "[did] not meaningfully and impartially review the petitioners' custody status." App., *infra*, 50a. The panel therefore held that each habeas petitioner is entitled to a hearing before an immigration judge at which he or she can present evidence in support of release pending removal, and that the habeas petitioner must be able to appeal any denial of a release request to the Board of Immigration Appeals. *Id.* at 51a.

b. On July 13, 1999, the district court issued an order in respondent's individual case, incorporating the joint order and applying the analysis of that order to his case. App., *infra*, 52a-54a. The court determined that certain facts relevant to determining the weight of the government's interest under the due process analysis were not adequately developed in the record, and it ordered an evidentiary hearing. *Id.* at 54a.

c. On September 29, 1999, following the hearing, the district court granted respondent habeas corpus relief. App., *infra*, 55a-61a. Although the government contended that the court should not adhere to the joint order in light of intervening developments, including the INS's institution of additional review procedures (see page 12, *infra*), the court decided to follow the joint order. *Id.* at 56a n.1.

Applying the framework of the joint order, the court first reviewed the government's representations concerning negotiations between the United States and Cambodia about entering into a formal agreement for the repatriation of Cambodian nationals. App., *infra*, 59a. Those negotiations included a meeting in September 1999 between officers of the State Department and the Cambodian Consulate in Washington, D.C., at which the United States' preliminary proposal for a repatriation agreement was discussed. Despite those developments, the court declared that respondent's "deportation to Cambodia is far from imminent," *ibid.* and concluded that "there is not a realistic chance that the government will accomplish [respondent's] deportation to Cambodia," *id.* at 60a. The court then held that respondent's detention, which it characterized as "indefinite," "violates his right to substantive due process." *Ibid.* The court also noted that, "[e]ven if there were a realistic chance of deporting [respondent], the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond." *Ibid.* The court directed that respondent be released subject to appropriate conditions. *Id.* at 61a.[4]

d. The district court stayed its order granting habeas relief in order to permit the government time to seek a stay

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[4] In light of its resolution of the case on substantive due process grounds, the court found it unnecessary to address any questions regarding procedural due process. App., *infra*, 61a n.5.

from the court of appeals. App., *infra*, 7a n.9. The court of appeals denied the stay request, and respondent was then released from INS custody on October 25, 1999. *Ibid.* On October 29, 1999, the government filed an application in this Court for a stay of the district court's order pending appeal to the Ninth Circuit. The Court denied that application. 120 S. Ct. 466 (1999).

4. During the pendency of respondent's case in the district court, the INS had implemented additional interim review procedures for cases involving aliens such as respondent who are detained in INS custody following issuance of final orders of removal because their immediate removal is not practicable. See App., *infra*, 69a-76a. By memorandum dated August 6, 1999, the INS Executive Associate Commissioner directed that, under the new interim procedures, a decision to continue an alien in INS custody would be subject to a review by INS headquarters. That headquarters review is similar to that afforded under the Cuban Review Plan, 8 C.F.R. 212.12, which has been in place for a number of years to review the status of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R. 212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. App., *infra*, 71a.

Under the interim procedures, the June 1999 decision to continue respondent in custody became subject to INS headquarters review. That review had not taken place by the time of the district court's order granting habeas corpus relief, but the adoption of the additional review procedures was brought to the court's attention. See App., *infra*, 57a. The headquarters review in respondent's case took place on

September 30, 1999, and the determination was to continue respondent in INS custody. See *Id.* at 87a-89a.[5]

5. The court of appeals affirmed the district court's judgment granting respondent habeas corpus relief, App., *infra*, 1a-33a, but without reaching the constitutional grounds on which the district court had relied. The court of appeals instead relied on statutory grounds, holding that the INS lacks authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period. App., *infra*, 3a-4a.[6]

The court of appeals acknowledged that Section 1231(a)(6) unambiguously authorizes the Attorney General to continue criminal aliens in custody "beyond the removal period." App., *infra*, 10a. The court concluded, however, that, because Section 1231(a)(6) does not specify a particular length of time during which continued detention is authorized, it should be construed to permit detention "only for a reasonable time beyond the statutory removal period." *Id.* at

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[5] On June 30, 2000, the Commissioner published proposed regulations to put in place a permanent custody-review program that would maintain or enhance the centralized review and other procedural protections set forth in the interim procedures. 65 Fed. Reg. 40,540-40,548.

[6] On March 30, 2000, respondent was arrested for assaulting a female companion. Respondent was released by the state court on bond pending disposition of the resulting criminal charges. On June 26, 2000, the state court dismissed the charges. We have been informed that the State intends to appeal that dismissal.

After respondent's arrest, he had been informed by the INS that it intended to revoke his release from immigration custody based on his violation of the terms of release. Respondent filed a motion in district court on April 7, 2000, seeking an order to prevent the INS from ordering him back into custody for violating his release conditions. On April 10, 2000, the court of appeals issued its decision affirming the district court judgment. In light of that decision, the government moved the district court to stay the hearing set for April 19 on the matter of INS's revocation of respondent's release, and the district court granted that motion.

11a. "In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future," the court "conclude[d] that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period." *Ibid.* The court explained that it adopted that construction of Section 1231(a)(6) because it allowed the court to avoid deciding the constitutionality of respondent's detention[7]; because it was unwilling to conclude that Congress intended to authorize indefinite detention in the absence of a clear statement to that effect; because it believed that reading a "reasonable time" limitation into Section 1231(a)(6) would be consistent with the Ninth Circuit's interpretation of a similar provision in an earlier immigration statute; and because that interpretation is, in the court's view, more "consonant with international law." *Ibid.*

The court of appeals then concluded that there is no reasonable likelihood that the INS will be able to remove respondent to Cambodia "[i]n the absence of a repatriation

[7] The court of appeals rejected the government's argument that the constitutional-avoidance doctrine is not applicable in this case because the constitutional question was answered by the Ninth Circuit's en banc decision in *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995), and this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The court distinguished those cases on the ground that they involved excludable aliens, *i.e.* aliens who had not entered the country, rather than aliens who already entered the country and had greater constitutional rights. App., *infra*, 14a-22a. The court noted that the Fifth Circuit, in resolving the constitutional question in *Zadvydas* v. *Underdown*, 185 F.3d 279 (1999), petition for cert. pending, No. 99-7791, had concluded that an alien under a final order of removal stands on essentially the same footing as an excludable alien. App., *infra*, 20a n.23. The court of appeals declined to adopt that approach, however, and decided, instead, to avoid the constitutional question by its statutory construction. *Ibid.*

agreement, extant or pending." App., *infra*, 32a. Therefore, under the court's ruling, the INS was no longer authorized to detain respondent. *Ibid.*[8]

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Attorney General is not authorized by 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent even though respondent is under a final order of removal, has been determined by the Attorney General to pose a risk of danger if released, and is entitled to automatic, period administrative review of his custody. That Ninth Circuit decision in this case squarely conflicts with the Tenth Circuit's decision in *Duy Dac Ho* v. *Greene*, 204 F.3d 1045 (2000), which held, *inter alia*, that Section 1231(a)(6) expressly allows the Attorney General, in her discretion, to continue to detain aliens such as respondent. In addition, the result reached by the Ninth Circuit cannot be reconciled with *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791, which did not question the statutory authorization for detention under Section 1231(a)(6) and rejected a constitutional challenge to such detention.

The scope of the Attorney General's authority to detain criminal aliens under final orders of removal who have been found to pose a threat of danger or flight is a question of exceptional public importance. The decision in this case has already affected a large number of cases pending before the Ninth Circuit and before district courts in that circuit. There are 59 cases pending on the government's appeal to the Ninth Circuit and an additional 40 cases in which a district court has ordered the release of such an alien, but a

[8] On June 2, 2000, the court of appeals denied rehearing and rehearing en banc. Although an active judge requested a vote on whether to rehear the case en banc, the matter failed to receive a majority of the votes of active judges in favor of en banc consideration. App., *infra*, 62a-63a.

notice of appeal has not yet been filed. And there are approximately 400 cases raising such challenges still pending in various district courts in the Ninth Circuit. The court of appeals' erroneous decision thus has already broadly intruded into the Attorney General's enforcement of the immigration laws and her ability to protect the public, and has ushered in a widespread disruption of the INS's orderly administration and review of the custody of many aliens similarly situated in the Ninth Circuit. For those reasons, and in view of the circuit conflict, review by this Court is warranted.

1. The court of appeals erred in ruling that, because Cambodia has thus far not agreed to respondent's return and the United States does not have a formal repatriation agreement with Cambodia, the Attorney General's continued detention of respondent is not authorized by 8 U.S.C. 1231(a)(6) (Supp. IV 1998).[9] The court of appeals ordered the INS to release respondent from custody even though: (1) the INS, in the exercise of express statutory authority, had decided that respondent should be retained in custody because he would pose a danger to the community if released; (2) the INS has adopted procedures that provide for periodic review of an alien's custody, under which respondent would be afforded the opportunity to demonstrate that he would no longer pose a danger to the community if released; and (3)

[9] Although the court of appeals "h[e]ld that Congress did not grant the INS authority to detain indefinitely aliens who, like [respondent], have entered the United States and cannot be removed to their native land *pursuant to a repatriation agreement*," App., *infra*, 10a (emphasis added) (see also *id.* at 25a), the question of a need for a formal repatriation agreement was never briefed in the court of appeals. We have been informed by the INS, however, that generally the removal of a criminal alien to another country does not proceed pursuant to a formal repatriation agreement but, rather, is effectuated through the normal process for obtaining travel documents for other nationals of that country.

the State Department is engaged in ongoing negotiations regarding an arrangement with Cambodia that would allow the removal of respondent and other aliens to that country.[10] Nothing in the text of Section 1231(a)(6) justifies the result reached by the court of appeals.

a. The opinion of the court of appeals rewrites an unambiguous statutory provision that was specifically designed, following a series of legislative amendments, to authorize the Attorney General to detain dangerous criminal aliens who are under a final order of removal. Section 1231(a)(6) should not be construed to mandate the automatic release of aliens in circumstances such as these, and thus to vitiate the important authority of the Attorney General to protect the public and to ensure the enforcement of the immigration laws, absent a clear expression of an intent by Congress to effect such a significant departure from past law.

The Immigration and Nationality Act (INA) provides that, once a final order of removal is entered against an alien, the alien becomes subject to detention by the INS for a period of 90 days (the "removal period"), during which period the Attorney General is to remove the alien. See 8 U.S.C. 1231(a)(1)(A) and (2) (Supp. IV 1998). Certain aliens, including aliens who have been found to be removable based on a conviction for an aggravated felony, must be detained during the 90-day removal period. Upon expiration of that 90-day period, the detention of specified categories of

[10] We have been informed by the INS and the Department of State that, on April 27, 2000, the United States and the Government of Cambodia reached agreement in principle regarding the repatriation of each other's nationals. The two countries memorialized that agreement in principle in a joint statement. We are lodging a copy of that statement with the Court and furnishing a copy to counsel for respondent. We sought to bring this development to the attention of the court of appeals in a reply brief in support of our petition for rehearing en banc, but the court of appeals denied leave to file that reply.

criminal aliens and certain other aliens is governed by 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The text of Section 1231(a)(6) is clear in authorizing the continued detention of the aliens it identifies:

> Inadmissible or criminal aliens.—An alien ordered removed who is inadmissible under section 1182, removable under section 1227 (a)(1)(C), 1227(a)(2), or 1227(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a)(6) (Supp. IV 1998) (emphasis added).

Section 1231(a)(6) sets no limitation on the length of detention beyond the removal period, leaving the continuation of detention to the sound discretion of the Attorney General. At the very least, the Attorney General's interpretation of Section 1231(a)(6) to authorize the detention of aliens in respondent's position is reasonable and therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), and *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). See also 8 U.S.C. 1103(a)(1) (Supp. IV 1998); *Barrera-Echavarria*, 44 F.3d at 1444 (according *Chevron* deference to Attorney General's interpretation of INA detention provision).

b. The Attorney General's interpretation of the text of Section 1231(a)(6) is fully supported by the evolution over the past decade of the statutory provisions governing detention of criminal aliens under final orders of removal.

Since at least 1990, Congress has unequivocally exempted the detention of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to other aliens. Indeed, Congress has consistently allowed, and at times mandated, that the Attorney

General continue to detain aggravated felons. By contrast, nothing in the last decade of amendments to the INA suggests that Congress intended that, rather than having six months to effectuate deportation with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable time" beyond 90 days, which in this case was deemed to be no time at all.

Before the enactment of Section 1231(a)(6) in 1996, the provisions of the INA governing the Attorney General's detention of an alien who was subject to a final order of deportation were found in Section 1252 of Title 8, which had been enacted in 1952 as Section 242 of the INA. 66 Stat. 208. Initially, Section 1252(c) and (d) provided that the Attorney General had a six-month period following entry of a final order of deportation during which to effect an alien's deportation. During that period, the alien could be detained or released at the discretion of the Attorney General. 8 U.S.C. 1252(c) (1982). After expiration of that period, "[i]f deportation ha[d] not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation ha[d] not been effected," the alien became "subject to such further supervision and detention pending eventual deportation" as was authorized in Section 1252. 8 U.S.C. 1252(c) (1982). If an alien's final order of deportation was outstanding for more than six months, the alien was, "pending eventual deportation, * * * subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. 1252(d) (1982).

In 1988, Congress enacted a provision directing the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release such an aggravated felon from custody, notwithstanding 8 U.S.C. 1252(a)(1) (1988), which

otherwise permitted the discretionary release of aliens pending deportation proceedings. See Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470; 8 U.S.C. 1252(a)(2) (1988). In 1990, Congress amended that mandatory-detention provision to specify, *inter alia*, that it applied notwithstanding subsections (c) and (d) of Section 1252—the provisions that otherwise generally governed an alien's detention after he became subject to a final order of deportation. The amendment also added a statutory exception to the mandatory-detention provision that required the release on bond or other conditions of those aggravated felons who had been lawfully admitted for permanent residence. That exception applied, however, only if the Attorney General determined that the alien was not a threat to the community and was likely to appear for immigration hearings. See Pub. L. No. 101-649, § 504(a), 104 Stat. 5049; 8 U.S.C. 1252(a)(2)(A) and (B) (Supp. II 1990).

In 1991, Congress amended the statutory exception to the provision for mandatory detention of aggravated felons to specify that the Attorney General could not release any lawfully admitted alien who was an aggravated felon, "either before or after a determination of deportability," unless the alien demonstrated "to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." Pub. L. No. 102-232, §306(a)(4), 105 Stat. 1751; 8 U.S.C. 1252(a)(2)(B) (Supp. III 1991); 8 U.S.C. 1252(a)(2)(B)(1994); see *Ho* v. *Greene*, 204 F.3d at 1056 n.8.

On April 24, 1996, Congress again amended 8 U.S.C. 1252(a)(2) through enactment of Section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277. That amendment expanded the group of criminal aliens subject to mandatory detention beyond aggravated felons, to include aliens convicted of other specified crimes. *Ibid.* At the same time, the amendment eliminated the provision allowing the

Attorney General to release criminal aliens, even those lawfully admitted aliens who she determined would not pose a threat of danger to the community or flight if released. *Ibid.*

It is against that backdrop that Congress enacted Sections 305(a)(3) and 306(a)(1) of IIRIRA, which amended the provisions regarding detention of criminal aliens under final orders of removal and moved them from 8 U.S.C. 1252(a)(2) (1994) (as amended by AEDPA) to 8 U.S.C. 1231(a) (Supp. IV 1998). See Pub. L. No. 104-208, §§ 305, 306, 110 Stat. 3009-598, 3009-607.[11] Under the new Section 1231(a), the INA continues to mandate that, following entry of a final order of removal, the Attorney General must detain certain aliens, including aggravated felons, during the removal period (which is now 90 days rather than six months). 8 U.S.C. 1231(a)(1) and (2) (Supp. IV 1998).[12] Section 1231(a) also preserves the Attorney General's authority to detain aggravated felons thereafter, specifying that they "may be detained beyond the removal period." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). Rather than requiring such detention as under AEDPA, however, Congress reinstated the pre-

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[11] IIRIRA also established the transition period custody rules, which were in effect for a two-year period ending in October 1998. IIRIRA § 303(b), 110 Stat. 3009-586 to 3009-587. Although those rules governed detention pending removal proceedings and are not directly implicated in the instant case, they also reflected Congress's intent to restrict the release of criminal aliens, including an alien who "cannot be removed because the designated country of removal will not accept the alien," if the Attorney General was not satisfied that the alien would not pose a danger to the community and would likely appear for scheduled proceedings. 110 Stat. 3009-587.

[12] See also 8 U.S.C. 1226(c)(1) and (2) (Supp. IV 1998) (mandating detention of, among others, aggravated felons pending removal proceedings, with the sole exception of aliens whose release is necessary to protect cooperating witnesses or their family members and only if the alien would not pose a risk of danger or flight).

AEDPA approach, granting the Attorney General discretion to decide whether to detain aggravated felons and any other alien "who has been determined by the Attorney General" to pose a risk of danger to the community or flight if released. 8 U.S.C. 1231(a)(6) (Supp. IV 1998).

There is no evidence to suggest that, in enacting Section 1231(a)(6), Congress intended, contrary to its consistent treatment of the detention of criminal aliens over the course of the preceding decade, to *require* the Attorney General to release an aggravated felon who she determines would pose a danger to the community or a flight risk if released. Section 1231(a)(6) is correctly interpreted, consistent with long-standing congressional intent, to ensure that the Attorney General retains the discretionary authority to detain such aliens.[13]

2. a. The court of appeals' ruling that the Attorney General's authority to detain aliens under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) beyond the removal period is limited to a judicially fashioned and undefined "reasonable time" directly conflicts with the Tenth Circuit's decision in *Ho* v. *Greene*, 204 F.3d at 1057. The Tenth Circuit held, *inter alia*, that Section 1231(a)(6) "is not ambiguous," *id.* at 1056, and "places no time limit on the detention of the aliens whose continued detention it authorizes," including aliens who the Attorney General has determined would pose a risk of danger or flight if released. *Id.* at 1057. To the contrary, it reasoned, the statute "expressly allows for continued detention beyond the

[13] When Congress acted to restrict the release of aggravated felons, it was well aware that certain countries have refused to accept the return of their nationals, and that such refusals could necessitate extended detention of some aliens beyond the removal period. See, *e.g.* IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) (1994) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals from the United States).

removal period with no time limit placed on the duration of such detention." *Ibid.* (emphasis omitted). The Tenth Circuit declined to "substitute its judgment for that of Congress by reading into the statute a time limit that is not included in the plain language of the statute." *Ibid.* The court concluded:

> The unambiguous language of 8 U.S.C. § 1231(a)(6) and the absence of an express time limit on the Attorney General's authority to continue to detain leads this court to conclude that Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens, * * * who cannot be removed within the ninety-day removal period.

Ibid.[14]

The Tenth Circuit, in *Ho*, also rejected a constitutional challenge to continued detention under Section 1231(a)(6). The court noted that any right the aliens in that case had to remain in this country "was extinguished when their removal orders became final." 204 F.3d at 1058 (citing 8 U.S.C. 1101(a)(20); 8 C.F.R. 1.1(p)). The court reasoned that, therefore, the purported liberty interests at stake "are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country and

[14] The Tenth Circuit noted that its statutory interpretation is in accord with the Third Circuit's decision in *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 394-395 (1999) (*Ngo*). In *Ngo*, the court of appeals rejected statutory and constitutional challenges to long-term detention of an excludable alien (one who has not entered the country, now termed "inadmissible" under the INA as amended by IIRIRA), who was under a final order of exclusion but could not be immediately removed. The detention of such inadmissible aliens following the 90-day removal period is now governed by the same statute that is at issue here, 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The Third Circuit read Section 1231(a)(6) to provide that the Attorney General "may continue to detain [an inadmissible alien] until deportation if he has been found guilty of designated crimes." 192 F.3d at 395.

who is subject to indeterminate detention because his country of origin will not accept his return." 204 F.3d at 1058. The court rejected the claim that a deportable alien possesses greater constitutional rights than an excludable alien in these circumstances because of his former status as a lawful permanent resident, noting that that argument had recently been rejected by the Fifth Circuit in *Zadvydas*, 185 F.3d at 294-297. Consequently, the Tenth Circuit rejected the aliens' due process claims because they did not possess a liberty interest in their asserted right to be temporarily admitted into this country. 204 F.3d at 1059-1060.

b. The result reached by the Ninth Circuit in this case also cannot be reconciled with the Fifth Circuit's decision in *Zadvydas*, which upheld the continued detention of an alien who is subject to a final order of deportation and whose deportation cannot be effected immediately. 185 F.3d at 287, 291, 297. The Fifth Circuit did not question that Section 1231(a)(6) authorized the detention of the alien beyond the 90-day removal period, see *id.* at 286-287, and it rejected a due process challenge to that detention.

The court analyzed the constitutional question on the premise that the detained alien is able to obtain periodic review of his detention under INS regulations (see 185 F.3d at 287-288 & n.9), and that the detention is not permanent or indefinite (see *id.* at 291-294). The court found that the detention is not permanent or indefinite because (1) the alien may be released after a review if the INS determines that he no longer poses a risk of danger or flight if released; and (2) it was not clearly established that there was no meaningful possibility of locating a country to which the alien could be removed, even though that process could be difficult and time consuming. *Ibid.* In those circumstances, the court held that the continued detention under Section 1231(a)(6) of a criminal alien who cannot be immediately removed did not violate substantive due process, in light of the government's

interest in protecting society from further criminal activity by the alien and in ensuring that he does not flee and thereby frustrate his eventual removal. *Id.* at 296-297.

The Fifth Circuit acknowledged the contrary constitutional ruling by the five-judge district court panel in the instant case and expressly declined to follow it. 185 F.3d at 297 n.20. In particular, the Fifth Circuit disagreed with the distinction drawn by the five-judge panel between excludable and deportable aliens (see App., *infra*, 42a). Thus, the Fifth Circuit concluded that the case before it, which involved a *deportable* alien who previously had been admitted to the United States, should not be distinguished from its own prior decision in *Gisbert* v. *United States Attorney General*, 988 F.2d 1437 (1993), and the Ninth Circuit's en banc decision in *Barrera-Echavarria*, which sustained the post-final-order detention of *excludable* Mariel Cubans who never entered the United States and who therefore had a greatly diminished claim to due process in connection with their removal.[15] The Fifth Circuit reasoned that, although permanent resident status entitles an alien to greater procedural due process protection in determining whether he is entitled to remain in the United States, such an alien does not have a "broadly privileged constitutional status relative to excludable aliens" concerning his detention once it is finally determined that he no longer has a right to remain in the United States. 185 F.3d at 295. The court also held that once a final order of removal is entered, "the national interest in effectuating deportation is identical

[15] In an even more recent decision involving an excludable Mariel Cuban, the Seventh Circuit held that the alien's several criminal convictions supported the Attorney General's decision to continue to detain him and that such detention was not unconstitutional. *Carrera-Valdez* v. *Perryman*, 211 F.3d 1046, 1048 (7th Cir. 2000).

regardless of whether the alien was once resident or excludable." *Id.* at 296; see *id.* at 288-290, 294-297.[16]

c. The constitutional rulings in *Ho* and *Zadvydas* demonstrate that the Ninth Circuit erred in this case in concluding that a time limitation should be read into Section 1231(a)(6) in order to avoid a serious constitutional question. The comprehensive administrative procedures for review of the detention of respondent (and that of any aliens similarly situated) foreclose any characterization of his detention as permanent or indefinite. As the Third Circuit held in *Chi Thon Ngo* v. *INS*, 192 F.3d 390 (1999) (*Ngo*), the new interim procedures satisfy due process because they "provide reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States. *Id.* at 399; cf. *Barrera-Echavarria*, 44 F.3d at 1450.

Under current regulations, aliens like respondent may request a formal custody review by the INS District Director at any time, 8 C.F.R. 241.4, 241.5. In determining whether an alien shall be released from detention, the District Director may consider: the nature and seriousness of the alien's criminal convictions; the alien's other criminal history; sentence(s) imposed and time actually served; the alien's history of failure to appear; the alien's probation history; disciplinary problems while incarcerated; evidence of rehabilitative effort

[16] The Third Circuit held in *Ngo*, which involved an excludable rather than a deportable alien, see note 14, *supra*, that criminal aliens may be detained for lengthy periods of time without violating due process when removal is beyond the control of INS, if the INS provides individualized periodic review of the alien's eligibility for release based on a current assessment of the risk of danger or flight posed by the alien if released. 192 F.3d at 398. The Third Circuit acknowledged the ruling by the five-judge district court panel in this case, but declined to follow it, stating that INS's then-recently implemented interim procedures providing for periodic and centralized review appeared on their face to satisfy any procedural due process concerns. *Id.* at 399.

or recidivism; equities in the United States; and prior immigration violations and history. 8 C.F.R. 241.4. As a supplement to that regulatory framework, the INS established procedures in February 1999 under which the custody status of detained aliens whose removal is not immediately possible or practicable will be subject to sua sponte review by the INS during the initial 90-day removal period and (if the alien is not released at the end of that 90-day period) periodically thereafter. App., *infra*, 64a-68a.

In addition, in August 1999, after the joint order of the district court in this case but before the ruling on respondent's individual request for habeas relief, the Attorney General and the Commissioner of the INS instituted still further procedures, which include centralized review by INS headquarters of the custody status of detainees in respondent's position. See App., *infra*, 69a-76a. Those new interim procedures, which were effective immediately and operate pending anticipated permanent changes to the regulations themselves, instituted a two-level custody review for aliens subject to detention under Section 1231(a)(6) after the initial 90-day removal period. Written notice must be given to the alien 30 days in advance of review, informing the alien of the factors that will be considered in making a custody determination, and explaining that the alien will have an opportunity to demonstrate that he is not a flight risk or a danger to the community. *Ibid.*; see also 8 C.F.R. 241.4. An interview of the alien is mandatory at the first custody review after the 90-day review, and the District Director's determination following the interview is subject to review by a specialized team in INS headquarters, in order to ensure consistency of decisions and an independent assessment outside the local district. App., *infra*, 71a. The headquarters panel may ratify the District Director's decision, return the case to the District Director for reconsideration, or determine that additional information is required. *Ibid.*

After the District Director reviews his decision in light of INS headquarters' evaluation, he will notify the alien of the final custody determination within 30 days of completion of the headquarters review. *Ibid.*[17] The INS thereafter conducts custody reviews, alternating between District Director file reviews and a review that includes an interview at the alien's request followed by a District Director determination that is subject to INS headquarters review. *Id.* at 73a. In addition to these sua sponte custody reviews by the INS, an alien detained under Section 1231(a)(6) may continue to request a custody review at any time under 8 C.F.R. 236.1(d)(2)(ii) and 241.4(a).

On June 30, 2000, the INS proposed regulations to revise the procedures established in the current regulations and the memoranda issued by the INS in February and August 1999, and to establish permanent procedures for post-order custody review cases. 65 Fed. Reg. 40,540-40,548. The new regulations would establish a custody review program for aliens such as respondent modeled after the regulations establishing the Cuban Review Plan, which governs the review of excludable Mariel Cubans who are in INS custody and whose removal to Cuba is not currently possible or practicable. See 8 C.F.R. 212.12. The regulations, which are subject to a 30-day notice-and-comment period, will, if adopted as proposed, permit a comprehensive and fair review of the continued detention of aliens through a process that "is intended to balance the need to protect the American public from potentially dangerous aliens, who remain in the United States contrary to law, with the humanitarian problems created by another country's unjustified delay or refusal to accept repatriation of its nationals." 65 Fed. Reg.

[17] After the INS's review of respondent under those procedures, the INS determined that respondent should be detained until the next periodic review. App., *infra*, 87a-89a.

at 40,540. The new procedures consist of a file review with the opportunity for a panel interview and recommendation, and a final decision by a separate INS Headquarters unit.

3. The court of appeals' opinion cannot be reconciled with this Court's jurisprudence holding that the judiciary has a limited role in reviewing the enforcement of immigration laws because of the integral connection of such laws to the nation's foreign relations. See, *e.g.*, *Aguirre-Aguirre*, 526 U.S. at 425 ("judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'"). The court of appeals may have believed that it would be better policy to condition post-order detention on the willingness of another country to accept back its nationals. In so holding, however, it has wrongly ousted Congress's authority to determine and to adjust the Nation's immigration laws in response to changed world conditions and domestic priorities and to vest in the Executive the sometimes delicate and difficult task of pressing for repatriation of another nation's citizens within the overall context of this Nation's foreign relations. See *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976) (recognizing that "a wide variety of classifications [in immigration laws] must be defined in the light of changing political and economic circumstances"); *Carlson* v. *Landon*, 342 U.S. 524, 534-536 (1952). As both the Fifth and Third Circuits have emphasized, even though aliens can claim some constitutional protections, "the power of the national government to act in the immigration sphere is * * * essentially plenary," and as such, is "largely immune from judicial inquiry or interference." *Zadvydas*, 185 F.3d at 289 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)); see also *Ngo*, 192 F.3d at 395-396.

Finally, the court of appeals' assertion that a "reasonable time" may be measured by the presence or absence of a re-

patriation agreement alone underscores its flawed analysis. Such formal agreements are rare. See note 9, *supra*. Moreover, the court of appeals' ruling could be misinterpreted to imply that the United States thinks removal of criminal aliens to Cambodia is futile, which is contrary to the position of the United States, speaking with one voice through the Executive Branch.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 99-35976

KIM HO MA, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL; AND ROBERT C. SMITH, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, SEATTLE, WASHINGTON, RESPONDENTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington

Decided: April 10, 2000

Before: REINHARDT, THOMPSON, and T.G. NELSON, Circuit Judges.

REINHARDT, Circuit Judge:

Petitioner Kim Ho Ma is an alien who left his native land, Cambodia, as a refugee at the age of two and has

resided in the United States as a legal permanent resident since he was six. At the age of seventeen he was involved in a gang-related shooting, and was convicted of manslaughter. After completing his prison sentence some two years later, he was taken into INS custody and ordered removed because of that conviction. However, the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma's return.[1] The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now twenty two, in detention indefinitely, perhaps for the remainder of his life.

Ma challenged his detention by filing a petition for habeas corpus, under 28 U.S.C. § 2241, in the District Court for the Western District of Washington. That court ruled that Ma's continued detention violates his substantive due process rights under the Fifth Amendment.[2] Respondents, the Immigration and Naturali-

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[1] There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries.

[2] In the district court in which Ma sought relief, over one hundred habeas corpus petitioners challenged their ongoing detention by the INS in cases similar to his. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. A single judge then applied this ruling to Ma and held that he should be released. Similar cases involving a large number of habeas petitioners have arisen in Nevada, and the Central, Eastern, and Southern Districts of California.

zation Service, Janet Reno (as Attorney General), and Robert Coleman (as INS Acting District Director in Seattle) (hereinafter collectively referred to as "INS") appeal the district court's decision releasing Ma from INS custody. We have jurisdiction[3] and affirm, but on a different basis.

We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold

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[3] Although neither party has argued either that the district court lacked jurisdiction over Ma's constitutional claims or that this court lacks jurisdiction to hear this appeal, the INS argued at one point in its brief that the general federal habeas statute, 28 U.S.C. § 2241, does not provide jurisdiction to hear any claim of statutory error or abuse of discretion. However, our recent decision in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999), makes clear that the scope of review under the general federal habeas statute, 28 U.S.C. § 2241, has not been limited by 8 U.S.C. § 1252, because that section does not mention habeas corpus explicitly. *Id.* at 609 (citing *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996)). Claims of statutory error and abuse of discretion in the application of the immigration laws have long been cognizable on habeas corpus. *See Magana-Pizano*, 200 F.3d at 609 (holding that general habeas statute allows review of statutory questions); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954) (reviewing denial of discretionary relief (suspension of deportation) on the merits, and reversing on ground that discretion was not exercised consistent with the statute). Thus, we hold that 8 U.S.C. § 1252 does not preclude us from considering Ma's non-constitutional arguments on habeas corpus.

that it may not detain the alien beyond that statutory removal period. Because we construe the statute as not permitting the indefinite detention of aliens like Ma, we need not decide the substantial constitutional questions raised by the INS's indefinite detention policy.

I.

Petitioner Kim Ho Ma's family fled Cambodia in 1979 and took Ma, who was then two years old, with them. After spending over five years in refugee camps, Ma's family lawfully entered the United States in 1985 as refugees. Ma's status was adjusted to that of a lawful permanent resident in 1987. In 1996, he was convicted, by a jury, of first degree manslaughter following a gang-related shooting. He was sentenced to 38 months in prison, but eventually served only 26 after receiving credit for good behavior. He was tried as an adult, although he was only seventeen years of age at the time of the crime. Although the INS repeatedly refers to Ma's criminal record, this was his only criminal conviction.

Ma's conviction made him removable as an alien convicted of certain crimes under 8 U.S.C. § 1227(a)(2). Because he was released by the state authorities after April 1, 1997, the INS's authority to take him into custody was governed by the permanent custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (codified at 8 U.S.C. § 1231). The INS took Ma into custody following his release from prison and initiated removal proceedings against him. An immigration judge found Ma removable, and furthermore found him ineligible for asylum or withholding of deportation because of his conviction.

Ma appealed this ruling to the Board of Immigration Appeals (BIA). The BIA affirmed the immigration judge's decision. Although Ma's order of removal became final on October 26, 1998, the INS could not remove him within the ninety day period during which it is authorized to do so because the United States had, and still has, no repatriation agreement with Cambodia. As a result, Ma remained in detention until he filed this petition for a writ of habeas corpus, which was granted by the district court on September 29, 1999. He is now twenty-two and has been in custody (and, but for the district court's decision, would have been incarcerated) for nearly five years, although his sentence accounts for only a little over two years of that period.

In addition to filing the habeas petition we now review, Ma made several other attempts to secure his release. During the pendency of the proceedings before the immigration judge and the BIA, Ma filed two motions to be released on bond—in October and December 1997. In both instances an immigration judge denied Ma's requests, finding, based solely on the offense he committed at the age of seventeen, that although he was not a flight risk, he was a danger to the community.

In May 1999, over six months after Ma's final removal order (and after his habeas petition was filed), the INS, by letter, requested travel documents for Ma from the Cambodian government.[4] The next day, the INS conducted the "ninety day" custody review, as

[4] The Cambodian government denied the request, as it does all such requests, because of the absence of a repatriation agreement.

provided for in its regulations, to determine if Ma should be released on bond.[5] An INS officer prepared a report after interviewing Ma and reviewing letters and other materials submitted by his family and friends. The officer's report stated that Ma's family was "very supportive," and that if Ma was released he would be able to assist his handicapped 71 year old father in everyday activities. The report also stated that Ma constantly communicates with his younger brother to assure that his brother "does not follow in his footsteps." In addition, the report noted that Ma's older brother runs his own business and would employ Ma if he were released from custody. A deputy district director then reviewed the INS officer's report and issued a decision denying Ma's release. The decision was sent to Ma by means of a form letter that stated that the deputy director made his decision after considering a set of factors set out in INS regulations;[6] however the letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release. The letter added that "there is no appeal from this decision."[7]

On September 30, 1999, pursuant to additional internal regulations, the INS again reviewed its decision to

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5 Internal INS regulations (known as the "Pearson I" regulations) required that Ma's case be reviewed before the end of the ninety day period. However, Ma received his custody review approximately 100 days after that period had run (190 days after his removal order became final).

6 8 C.F.R. § 241.4.

7 The letter also stated that Ma's case would be reviewed again six months from the date of the letter, on December 2, 1999. It also stated that Ma had the right to submit a request for redetermination of his custody status at any time.

continue detaining Ma.[8] Once again, INS officials found that Ma should remain in detention, based on the seriousness of his conviction and also on the ground of his threatened participation in a hunger strike while in custody. The reviewers stated that they were unable to conclude that Ma would "remain non-violent" and abide by the terms of his release. These decisions were made despite abundant information in the administrative record about Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior. Upon reviewing Ma's habeas petition, the district court ruled that Ma's detention was unconstitutional on "substantive due process" grounds and ordered him released pending the outcome of this appeal. This court and the Supreme Court denied the INS's requests for a stay of the district court's release order.[9] The INS now appeals the district court's decision granting Ma's habeas corpus petition.

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8 After Ma and the other four lead petitioners prevailed in district court, the INS implemented additional regulations, known as the "Pearson II" regulations, which provided for additional review of custody decisions. These regulations provide for review of the decisions of district directors by INS Headquarters, which was then done in this case.

9 The INS sought to stay the district court's release order. The district court denied the order but granted the INS a temporary stay so that it might attempt to secure an emergency stay from this court. We denied the stay. The INS filed a second emergency stay request, pending appeal to the Supreme Court. We again denied the stay and ordered Ma released. He was released that evening. The INS then sought a stay from the Supreme Court. Justice O'Connor ordered a temporary stay pending a review by the whole Court. Ma surrendered to INS custody pending the Court's decision. The Court denied the INS's stay request, and Ma was again ordered released.

II.

Although the bulk of the parties' arguments, as well as the district court's ruling, address the constitutionality of the INS's detention policy, we must first determine whether Congress provided the INS with the authority to detain Ma indefinitely, as the Attorney General contends.

In general, after an alien is found removable, the Attorney General is required to remove that alien within ninety days after the removal order becomes administratively final.[10] Many aliens, however, cannot be removed within the ninety day period for various reasons. First, some individual cases may simply require more time for processing. Second, there are cases involving aliens who have been ordered removed to countries with whom the United States does not have a repatriation agreement, such as Cambodia, Laos, and Vietnam. Finally, there may be those aliens whose countries refuse to take them for other reasons, and yet others who may be effectively "stateless" because of their race and/or place of birth.[11] Ma falls in the second category.

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[10] *See* 8 U.S.C. § 1231(a)(1)(A)-(B). If the removal order is stayed pending judicial review, the ninety day period begins running after the reviewing court's final order. 8 U.S.C. § 1231(a)(1)(B)(ii).

[11] *See, e.g., Caranica v. Nagle*, 28 F.2d 955 (9th Cir.1928) (involving deportation order to Greece of alien born in Macedonia, which was then a Turkish province that was later partitioned among several countries, including Greece, where Greece would not recognize alien as a citizen).

Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups. Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. 8 U.S.C. § 1231(a)(3). Those in the second group "*may be detained beyond the removal period*" and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. 8 U.S.C. § 1231(a)(6).[12] Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. § 1227(a)(2). Ma's criminal conviction places him in the second group.

INS argues that its authority to "detain beyond the removal period" gives it the authority to detain *indefinitely* aliens who fall in the second group and who cannot be removed in the reasonably foreseeable future.[13]

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[12] The sub-section provides in full that

> [a]n alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

48 U.S.C. § 1231(a)(6).

[13] Although we recognize that, in general, the Attorney General's interpretation of the immigration laws is entitled to

Ma argues the opposite—that the INS's authority to detain aliens beyond the removal period does not extend to cases in which removal is not likely in the reasonably foreseeable future. On its face, the statute's text compels neither interpretation: while § 1231(a)(6) allows for the detention of group two aliens "beyond" ninety days, it is silent about how long beyond the ninety day period such detention is authorized. Thus, any construction of the statute must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be "indefinitely," "for a reasonable time," or some other temporal measure.

We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as

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substantial deference, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L.Ed.2d 590 (1999), we have held that *Chevron* principles (*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe. *Williams v. Babbitt*, 115 F.3d 657, 661-63 (9th Cir. 1997) (analyzing *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988) and *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), noting the agency's lack of constitutional expertise, and concluding that "just as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so"). As we explain *infra*, the agency's interpretation raises just such a substantial question.

providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

We adopt our construction of the statute for several reasons. First, and most important, the result we reach allows us to avoid deciding whether or not INS's indefinite detention policy violates the due process guarantees of the Fifth Amendment. Second, our reading is the most reasonable one—it better comports with the language of the statute and permits us to avoid assuming that Congress intended a result as harsh as indefinite detention in the absence of any clear statement to that effect. Third, reading an implicit "reasonable time" limitation into the statute is consistent with our case law interpreting a similar provision in a prior immigration statute. Finally, the interpretation we adopt is more consonant with international law.[14]

III.

The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding

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[14] Petitioner also contests the procedures used by INS when considering his requests for release, asserting that they violate procedural due process. Given our holding, we need not reach that constitutional question either.

substantial constitutional questions. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L.Ed. 1061 (1916); *see also United States v. Bulacan*, 156 F.3d 963, 974 (9th Cir. 1998). We have referred to this rule as a "paramount principle of judicial restraint." *United States v. Restrepo*, 946 F.2d 654, 673 (9th Cir. 1991).

In the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems. For example, in *United States v. Witkovich*, 353 U.S. 194, 199, 77 S. Ct. 779, 1 L.Ed.2d 765 (1957), the Court read a limitation into a statute authorizing the INS to ask questions and receive information from deportable aliens within the United States. Because constitutional problems would have arisen if the statute were read as penalizing aliens who refused to answer questions that were irrelevant to any legitimate governmental purpose, the Court chose to read a limitation into the statute. *Witkovich*, 353 U.S. at 199, 77 S. Ct. 779.

We followed *Witkovich* in *Romero v. INS*, 39 F.3d 977 (9th Cir. 1994), which involved an alien who had lied to an INS official, thereby rendering her deportable because she violated a condition of her immigration status. The condition required that she answer truthfully all questions put to her by INS officials. However, the questions she did not answer truthfully were irrelevant to her visa status. Although the provision at issue stated that aliens who failed to comply with the conditions of their status were deportable, without

defining those conditions in any way, we read into the statute a limitation on the kinds of conditions that the Attorney General could place on aliens. *Id.* at 979-80. Invoking the canon of constitutional avoidance, we concluded that the alien could not be required to answer questions having nothing to do with her visa status. *Id.* at 981; *cf. Jean v. Nelson*, 472 U.S. 846, 854-56, 105 S. Ct. 2992, 86 L.Ed.2d 664 (1985) (holding that immigration parole regulation does not permit race discrimination in order to avoid reaching constitutional question); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1271 (9th Cir. 1992) (interpreting statute stating that Office "may" provide representation to judges as requiring interpretation based upon criteria not listed in the statute, in order to avoid constitutional problems).

Of course, as the Supreme Court has noted repeatedly when formulating the canon of constitutional avoidance, the rule applies when the constitutional issue at hand is a substantial one.[15] The INS contends that the answer to Ma's constitutional challenge is

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[15] The Court has also described the canon as applying to "difficult," "serious," or "grave" constitutional issues. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 875, 116 S. Ct. 2432, 135 L.Ed.2d 964 (1996); *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 387, 118 S. Ct. 818, 139 L.Ed.2d 797 (1998) (Rehnquist, CJ, concurring in part and dissenting in part); *Jones v. United States*, 526 U.S. 227, 239, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999). Regardless of the terminology used, the point seems to be the same: a party cannot force us to ignore the usual canons of statutory construction by raising a frivolous, insubstantial, or patently incorrect constitutional argument. Nor, as the Court put it in *United States v. Locke*, 471 U.S. 84, 96, 105 S. Ct. 1785, 85 L.Ed.2d 64 (1985), may we resort to "disingenuous evasion" in our interpretation of the statute to avoid a constitutional question.

dictated by a straightforward application of our en banc decision in *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), and the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953).[16] If this were correct, we would not need to invoke the canon of constitutional avoidance. However, those cases deal with a significantly different problem from the one we avoid here. Both *Mezei* and *Barrera-Echavarria* involved excludable aliens rather than aliens who have already entered the United States. As a result, the constitutional analysis in both cases rests on a doctrine known as the "entry fiction," which authorizes the courts to treat an alien in exclusion proceedings as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States. Both decisions were entirely explicit in their reasoning on this point. In *Mezei*, the Court relied on the entry fiction (that an excludable alien has not entered the United States) in holding that an excludable alien is not entitled to procedural due process:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of

[16] The INS also makes repeated reference to *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L.Ed. 547 (1952). However, *Carlson* upheld the constitutionality of detention pending the INS's decision whether to deport an alien, and expressly noted that the problem of "unusual delay" was not before it, and referenced a case involving a Russian petitioner who alleged that his country would not accept his return. *Id.* at 546, 72 S. Ct. 525 (citing *United States ex rel. Potash v. District Director*, 169 F.2d 747, 748 (2d Cir.1948)).

> fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. . . .
>
> Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding.

Id. at 212-13, 73 S. Ct. 625 (internal citations omitted). While the Court held that Mezei could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that Mezei's exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights.[17]

We followed *Mezei* in *Barrera-Echavarria*, which involved a Mariel Cuban who was detained while excluded from the U.S.[18] After describing the petitioner's

[17] Although the INS notes that the plaintiff in *Mezei* was previously a lawful resident of the U.S. for twenty-five years, the Court made clear that he was to be treated as an excludable alien because of his long departure from the U.S., and could not have his status "assimilated" to that of a permanent resident. In doing so, the Court distinguished, on its facts, its then-recent decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L.Ed. 576 (1953), which authorized such assimilation of status under some circumstances. *Mezei*, 345 U.S. at 213-14, 73 S. Ct. 625. There is no doubt that Mezei was considered by the Court to be an excludable alien who had not entered the U.S., despite what the Court referred to as his "prior residence here." *See Mezei* at 212-13, 73 S. Ct. 625.

[18] Barrera-Echavarria was paroled while excluded, committed numerous crimes, and thereafter was taken back into custody. *Barrera-Echavarria*, 44 F.3d at 1444. His parole did not constitute

argument and noting our disagreement, we began our analysis by relying on the historic distinction between excludable and resident aliens:

> The Supreme Court has consistently recognized that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category.

Barrera-Echavarria, 44 F.3d at 1448 (quotations omitted, alteration in original). We also quoted a passage from *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982), stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Barrera-Echavarria*, 44 F.3d at 1449.[19] Shortly after this quotation, we noted that

> Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. [citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990) and *Johnson v. Eisentrager*] Because excludable aliens are deemed under the entry doctrine not to be present on United States

an entry. *Leng May Ma v. Barber*, 357 U.S. 185, 188, 78 S. Ct. 1072, 2 L.Ed.2d 1246 (1958).

[19] Amici Law Professors note in their brief that in its petition for rehearing en banc which led to the *Barrera-Echavarria* decision the INS relied on the fact that the petitioner was an alien seeking admission (rather than one who had entered).

> territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.

Barrera-Echavarria, 44 F.3d at 1450.

Thus, it is not surprising that *Barrera-Echavarria* upheld as constitutional the long-term detention of aliens who had not entered the United States, legally or illegally (although they had been paroled into this country). As we stated in that case, it is "not settled" that excludable aliens have any constitutional rights at all, *id.* at 1449, so it is clear that they cannot prevail where the government refuses to admit them.[20] In

[20] In *Barrera-Echavarria*, we concluded that the statutes there at issue, which applied only to the detention of excludable aliens, allowed for the long-term detention of such aliens, *id.* at 1445, and went on to hold that such detention is constitutional. There is no inconsistency between our statutory holding in *Barrera-Echavarria* and our statutory holding here. We found the statutory authority to hold Barrera-Echavarria for a prolonged period implicit in the history and structure of several provisions granting broad discretion to the Attorney General to parole excludable aliens into the country under certain circumstances. *Id.* at 1445-48. We noted that the parole of excludable aliens had always been the exception rather than the rule, and that releasing such aliens into the country pending deportation would run contrary to the basic statutory scheme precluding such entry. *Id.* at 1447. In the case before us, we consider the entirely different question of aliens who have already entered the country. Thus, unlike in *Barrera-Echavarria*, there is no long-standing statutory scheme that would be "upset" by barring prolonged detention here. *Id.* at 1446. Most important, because in *Barrera-Echavarria* the various statutory provisions at issue did not apply to the detention of aliens who had already entered the United States, there was no need to invoke the canon of constitutional avoidance. The constitutional result in *Barrera-Echavarria* was dictated by the Supreme Court's holding in *Mezei* regarding *excludable* aliens.

contrast to *Mezei* and *Barrera-Echavarria*, numerous cases establish that once an alien has "entered" U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976) (stating that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted)); *Leng May Ma v. Barber*, 357 U.S. 185, 187, 78 S. Ct. 1072, 2 L.Ed.2d 1246 (1958) (stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry'"); *cf. Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that illegal alien children have constitutional right to education).[21]

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[21] The cases extending Fifth Amendment protection to aliens are fully consistent with our general jurisprudence granting significant constitutional protections to aliens within the territory of the United States. The Supreme Court has held that the Equal Protection Clause applies to aliens, *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L.Ed. 220 (1886), that the Fourth Amendment applies to aliens (within U.S. territory), *Almeida-Sanchez v. United States*, 413 U.S. 266, 274, 93 S. Ct. 2535, 37 L.Ed.2d 596 (1973), and that the First Amendment applies to aliens. *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945) (holding that "freedom of speech and of press is accorded aliens residing in this country"); *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 86 L.Ed. 192 (1941) (same).

Unlike the petitioners in *Mezei* and *Barrera-Echavarria*, Ma was admitted to and entered the United States as a refugee when he was a child, and has lived here ever since. He does not seek to "force us to admit him." *Mezei*, 345 U.S. at 210, 73 S. Ct. 625. The cases involving indefinite detention of excludable aliens simply do not support the constitutionality of indefinite detention of aliens who have entered the United States. To the contrary, our case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment.[22]

The INS also argues that *Barrera-Echavarria* and *Mezei* control the result here because, for constitutional purposes, an alien ordered removed has no further right to be here and therefore stands on essentially the

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[22] The INS cites *Fong Yue Ting v. United States*, 149 U.S. 698, 711-13, 13 S. Ct. 1016, 37 L.Ed. 905 (1893), for the proposition that "[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Id.* at 713, 13 S. Ct. 1016. However, that proposition as applied to the distinction between the constitutional rights of deportable and excludable aliens is no longer good law. The Court in *Fong Yue Ting* went on to hold that aliens may be deported using processes exercised "entirely through executive officers." *Id.* at 714, 13 S. Ct. 1016. That part of *Fong Yue Ting*'s holding was overruled ten years later, when the Supreme Court held that deportation proceedings for aliens within the U.S. must conform to due process. *Yamataya v. Fisher*, 189 U.S. 86, 101, 23 S. Ct. 611, 47 L.Ed. 721 (1903).

same footing as an excludable alien.[23] While this novel theory would dispose of the constitutional question raised by indefinite detention of such resident aliens, we cannot easily reconcile it with controlling case law. In particular, the INS's position appears to be clearly inconsistent with the Supreme Court's holding in *Wong Wing* that illegal aliens within the territorial jurisdiction of the U.S. who had been ordered deported could not be put to hard labor prior to their deportation. *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L.Ed. 140 (1896). Although the INS argues that *Wong Wing* establishes only the proposition that irrational abuses against aliens who have been ordered deported are unjustified, *Wong Wing* makes clear that Congress deliberately created the hard labor policy "to promote its policy in respect to Chinese persons"

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[23] We note that the Fifth Circuit relied on the INS's argument in resolving the constitutional question we avoid today, holding that long-term detention of removable aliens who have been ordered deported does not violate substantive due process. *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999). Although we seriously question the Fifth Circuit's conclusion in that case, and in particular its reading of *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L.Ed. 140 (1896), and *Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982), we need not reach the constitutional question here. At the very least, it is clear from reading *Zadvydas* that a substantial constitutional question exists regarding the construction of § 1231(a)(6).

Following oral argument, the Tenth Circuit considered the constitutional question in *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000), and, by a 2-1 vote, accepted the Fifth Circuit's view. Moreover, the Tenth Circuit concluded that because § 1231(a)(6) was silent as to any time duration, "Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens." *Id.* at 1057. For the reasons stated below, we do not find the Tenth Circuit's reasoning persuasive.

(presumably by creating deterrence and encouraging voluntary departure). *Wong Wing*, 163 U.S. at 235, 237, 16 S. Ct. 977. The Court said nothing about "irrationality," only unconstitutionality. In short, it unanimously struck down, on Fifth Amendment grounds, Congress' policy with respect to aliens who had been ordered deported even though that policy was passed in furtherance of legitimate immigration goals. *See also Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982) (holding that resident alien has due process rights in exclusion proceedings because her "constitutional status" is greater than that of a first-time entrant); *Johnson v. Eisentrager*, 339 U.S. 763, 771, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) (holding that the Fifth Amendment grants rights to aliens within the territorial jurisdiction of the U.S., but not to those outside the territory). In order to adopt the INS's approach here, we would have to reconcile *Wong Wing*, which affords constitutional protection to aliens who have been ordered deported, with the INS's suggested rule—which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection. That would be a daunting, if not impossible, task.[24]

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[24] The INS also argues that all immigration-related decisions are entitled to substantial deference under the plenary power, citing *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993). However, it is not clear what role the plenary power played in *Flores*. In that case, the Court found that rational basis review applied, noted that the plenary power was applicable, but then stated that "[o]f course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." *Flores*, 507 U.S. at 306, 113 S. Ct. 1439. Ma argues that the plenary power's general deference rule does not apply in every case, citing *INS v. Chadha*, 462 U.S. 919, 940-41,

It is clear that the INS's effort to extend exclusion law to aliens who have entered the United States but have been ordered removed raises a substantial constitutional question, at the very least. Even if we were to agree with the Fifth Circuit's constitutional holding—and we do not by any means suggest that we do—we would first be required to answer that question. As we may avoid doing so by giving the statute a construction that does not require us to undertake any constitutional inquiry, we follow that course here.

We believe the construction of § 1231(a)(6) we adopt—that the INS may detain aliens who have entered the country but have been ordered removed only for "a reasonable time" beyond the ninety day statutory removal period, and specifically, that such aliens may not be detained beyond that statutory

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103 S. Ct. 2764, 77 L.Ed.2d 317 (1983) (striking down law governing suspension of deportation, stating that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing [the plenary] power. . . . Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." (internal citation omitted)) and *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-101, 96 S. Ct. 1895, 48 L.Ed.2d 495 (1976) (striking down Civil Service Commission's blanket ban on employing non-citizens and rejecting contention that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). It is not clear why the plenary power's deference rule should apply here given that such deference was not afforded in *Chadha* or in *Hampton*. In any event, the Supreme Court's cases make clear that the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints.

removal period if there is no reasonable likelihood that their country of origin will permit their return in the reasonably foreseeable future—to be the most plausible reading of the statute. However, we note that, in order to avoid the substantial constitutional concerns presented by the INS's interpretation, we could adopt a strained construction of the statute, one that would not otherwise constitute sound statutory construction. As one of our learned colleagues recently explained,

> [S]tatutory construction and constitutional narrowing . . . are, in fact, very different animals. . . . Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 652-654, 104 S. Ct. 3262, 82 L.Ed.2d 487 (1984). In performing the former task we may not add anything to the statute that is not already there . . . in performing the latter function, we must do precisely that. . . . In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected.

United States v. X-Citement Video, Inc., 982 F.2d 1285, 1295 n. 6 (9th Cir.) (Kozinski, J., dissenting), *rev'd* 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). In reversing the majority, the Supreme Court endorsed our dissenting colleague's approach, holding that a statute should be construed to avoid constitutional problems so long as the saving construction is not "plainly contrary to the intent of Congress." 513 U.S. at 78, 115 S. Ct. 464. The discussion which follows will make clear that the construction we adopt is by no means plainly con-

trary to Congress's intent, but is instead the most reasonable interpretation of the statute.

IV.

The interpretation we give section 1231(a)(6) is clearly the most reasonable one. The provision that the INS may hold individuals "beyond" a specified time demonstrates Congress's intent that the otherwise applicable time limit not be deemed absolute in all cases, and that the agency have *some* flexibility in instances in which additional time may be useful. It does not demonstrate an intent to give the INS any greater authority than that—and certainly not an intent to permit the agency to hold people in detention for the remainder of their lives. Such is surely the case with respect to aliens who have entered the country and are generally entitled to the protections of our Constitution. It would indeed be surprising were Congress to attempt to authorize permanent or indefinite detention of such persons simply by providing that they may be held *beyond* a ninety day period. Some greater degree of specificity or demonstration of Congressional intent would be necessary before we would conclude that a statute had granted the INS so sweeping a power with regard to persons who are generally subject to the protections of the Constitution. We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express language to that effect in the statute.[25]

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[25] In the prior statute, Congress used language prohibiting release (subject to some exceptions) rather than the language authorizing detention used here. *See* 8 U.S.C. § 1252(a)(2)(B) (1995) (stating that the "Attorney General *may not* release [deportable aliens convicted of an aggravated felony] . . . *either before or after* a determination of deportability [subject to some exceptions].") (emphasis added). The two custody provisions that succeeded the 1995 version of this law (and preceded the current version) did not change this language in any way relevant to our analysis. The same "may not release . . . either before or after" language was in both statutes. *See* AEDPA § 440(c); IIRIRA § 303(b)(3) (the transitional custody rule). The prohibitory language used there is obviously far stronger than the permissive language used in the new law. More important, however, Congress is familiar with time limitations in the detention and removal context, and could easily have authorized detention "without limitation" or "indefinitely" if it so desired. *See, e.g.*, 8 U.S.C. § 1231(a)(1)(A); 1231(a)(1)(C); 1231(b)(2)(C); 1231(b)(2)(D); 1231(c)(3)(A); 1231(c)(3)(B) (all specifying various time periods in detention and removal context).

To sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies. In the simplest terms, to say that the INS may hold persons *beyond* a particular date does not answer the question "for how long?". The proper reading, we conclude, is that Congress intended only that the short statutory period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose—the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens. Because, here, there is no repatriation agreement and no demonstration of a reasonable likelihood that one will be entered into in the near future, we believe it to be not only the prudent but the correct interpretation of the statute to hold that

Ma and others similarly situated aliens must be released, under supervision, at the end of the statutory removal period. 8 U.S.C. § 1231(a)(1)(A).

V.

Our conclusion that a "reasonable time" limitation is implicit in the statute is supported by a venerable line of Ninth Circuit cases that held that a predecessor provision must be construed as allowing only for detention "reasonably" beyond the removal period.

Prior to 1952, the detention of aliens pending deportation was governed by the Immigration Act of 1917. That statute set no time limit to accomplish a deportation. The Act provided simply that deportable aliens should be "taken into custody and deported."[26] Then, just as now, there were cases involving aliens who could not be deported for various reasons—because the U.S. had no repatriation agreement with their country, because their country would not take them back, or because they were stateless. In several cases, this court held that while the deportation order would remain valid indefinitely, detention was justified only for a reasonable period. For example, in *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928), the alien challenged an order mandating his deportation to Greece on the ground that he was a Macedonian citizen, not a Greek citizen. *Id.* at 956. The court upheld the order, holding that the statute allowed for deportation to Greece. The court held that the Secretary of Labor had

[26] *See* An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 19, 39 Stat. 874, 889 (1917).

broad discretion to find an appropriate country of deportation, but added that "the utmost the courts can or will do is to discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time." *Id.* at 957; *see also Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (upholding deportation order to Russia (but not to China) and holding that petitioner must be released if he could not be deported to Russia); *Wolck v. Weedin*, 58 F.2d 928, 930-31 (9th Cir. 1932) (upholding deportation order, but ruling, consistent with administrative practice, that alien should be released if deportation could not be effected within a reasonable time). *See also United States ex rel. Ross v. Wallis*, 279 F. 401, 403 (2d Cir. 1922) (requiring release if deportation could not be effected within reasonable period).[27]

We recognized the continuing vitality of this rule in a case applying the 1917 Act that we decided in 1954. *Spector v. Landon*, 209 F.2d 481 (9th Cir. 1954). In *Spector*, the petitioner was an alien who had been ordered deported in 1930, almost a quarter of a century earlier, and had been out on bond for most of the intervening period, but whose deportation the government had been unable to accomplish for various diplomatic reasons. *Id.* at 482. He argued that as a result of

[27] Notably, the "reasonable time" allowed to effectuate deportation in such cases seems to have been quite short by contemporary standards. In *Caranica* the court held that a two month deadline was not an abuse of discretion, 28 F.2d at 957, while in *Wolck* the court gave the government thirty days to implement the order, 58 F.2d at 931; in *Wallis* the Second Circuit required release after four months. 279 F. at 404.

the passage of time the deportation order was no longer valid. We rejected this contention, stating that

> No cases have been found by counsel holding that a deportation warrant becomes invalid or unenforceable through mere lapse of time. . . . There are a number of decisions in habeas corpus to the effect that *the right to hold the alien in custody under a deportation warrant persists for no more than a reasonable period.* But such holdings lend no color to the contention made here.

Id. (emphasis added) (citations omitted). Thus, even as we denied Spector's claim, we recognized that the 1917 Act did not authorize indefinite detention pending deportation even though the statute did not, by its terms, place any temporal limit on the government's authority; we read the statute as containing an implicit provision that detention was authorized only for a "reasonable period."

While these older cases did not interpret a statute exactly like the one we consider today, because the 1917 Act made no distinction between aliens whose release following the removal period was required and aliens who could be detained following that period, both the 1917 statute and the current law provide for custody pending deportation and set forth no specific time limitations as to the period of detention. Although these older cases do not make their reasoning entirely explicit, they appear to rely on the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention. That principle seems as valid today as it was under the 1917 Act. We too are faced

with a statute that does not contain an express statutory proscription against release. Like the courts interpreting the 1917 Act, we assume that the statute implicitly provides for a reasonable limitation on the length of detention. In doing so, we refuse to presume that Congress authorized the indefinite detention of resident aliens long after they have finished serving their sentence merely because their country does not have a repatriation agreement with the United States.

VI.

In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established *Charming Betsy* rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S. Ct. 1510, 71 L.Ed.2d 715 (1982) (citing *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-118, 2 L.Ed. 208 (1804)). We have reaffirmed this rule on several occasions. In *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990), we explained that we adhere to this principle "out of respect for other nations." *Id.* at 1069 (citing *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984)); *see also In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998).

We recently recognized that "a clear international prohibition" exists against prolonged and arbitrary detention. *Martinez v. City of Los Angeles*, 141 F.3d

1373, 1384 (9th Cir. 1998).[28] Furthermore, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, *see* 138 Cong. Rec. S4781-84 (Apr. 2, 1992), provides that "[n]o one shall be subjected to arbitrary arrest and detention." See International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, *entered into force* Mar. 23, 1976, at Art. 9(1); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S. Ct. 1776, 80 L.Ed.2d 273 (1984) (holding that ambiguous Congressional action should not be construed to abrogate a treaty).

In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law. In *Martinez*, 141 F.3d

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[28] This court has held that within the domestic legal structure, international law is displaced by "a properly enacted statute, provided it be constitutional, even if that statute violates international law." *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991) (involving prolonged detention of excludable aliens); *see also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995). Those rulings, however, do not suggest that courts should refrain from applying the *Charming Betsy* principle. Rather, they stand for the proposition that when Congress has clearly abrogated international law through legislation, that legislation nonetheless has the full force of law. *See Restatement (Third) of International Law* § 115(1)(a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). Although Congress *may* override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.

1373, we expressed our approval of a district court decision in this circuit holding that "individuals imprisoned for years without being charged were arbitrarily detained" in violation of international law, *id.* at 1384 (citing *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)). Given the strength of the rule of international law, our construction of the statute renders it consistent with the *Charming Betsy* rule.

CONCLUSION

In the face of these compelling statutory arguments, we do not read § 1231(a)(6) as authorizing the indefinite detention of removable aliens. Rather, we hold that the statute authorizes the Attorney General to detain removable aliens only for a reasonable time beyond the ninety day removal period. While we could reach this construction of the statute simply by invoking the doctrine of constitutional avoidance, it is not necessary to rest our decision on that legal principle. As the above discussion makes clear, ordinary tenets of statutory construction lead us to that same result. What constitutes a reasonable time will depend on the circumstances of the various cases. Here, we need not address all the conceivable situations that could arise to delay or preclude removal. We need hold only that where it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the removal period is not justified.[29]

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[29] We recognize that our reference to aliens who have already entered is, in one sense, too broad. Aliens who entered the United States in the past but have since left for a significant time have no more constitutional rights than first-time would-be entrants. *See*

In Ma's case, the district court did not err in concluding that there is not a reasonable likelihood that the INS will be able to remove Ma to Cambodia. Although the INS offered evidence that the State Department has submitted a proposal for a repatriation agreement to the Cambodian government, both sides agree that the United States has no functioning repatriation agreement with that country, that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time). In the absence of a repatriation agreement, extant or pending, we must affirm the district court's finding that there is no reasonable likelihood that the INS will be able to accomplish Ma's removal.[30] Under these circumstances, the INS may not detain Ma any longer.

We stress that our decision does not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place. All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. § 1231(a)(3). Ma will have to appear before an immigration officer periodi-

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Landon, 459 U.S. at 30, 103 S. Ct. 321; *Mezei*, 345 U.S. at 213, 73 S. Ct. 625. They are considered "excludable."

[30] We note that our construction of the statute does not require us to "second-guess" or otherwise interfere with the foreign policy actions of the United States government. On the contrary, we have taken at face value the evidence submitted by a State Department officer regarding the status of the government's attempts to establish a repatriation agreement with Cambodia. He has candidly stated that he cannot predict when a repatriation agreement will be established and begin to function.

cally, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on his conduct and activities, including severe travel limitations. More important, if Ma engages in any criminal activity during this time, including violation of his supervisory release conditions, he can be detained and incarcerated as part of the normal criminal process.[31]

For the foregoing reasons, the district court's decision is

AFFIRMED.

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[31] We note that the regulations governing Ma's release state that he can be detained for violating them, and moreover that violations of supervisory release conditions are punishable by fine and/or imprisonment under 8 U.S.C. § 1253(b).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

Nos. C98-234Z, C99-177C, C99-185R, C99-341WD and C99-151L

BINH PHAN, SON THAI HUYNH, DENNIS VLADIMIROVICH BATYUCHENKO, KHAMSAENE SIVONGXAY, KIM HO MA, PETITIONERS

v.

JANET RENO; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; AND RICHARD C. SMITH, RESPONDENTS

July 9, 1999

JOINT ORDER

Before: JOHN C. COUGHENOUR, Chief Judge, and BARBARA JACOBS ROTHSTEIN, WILLIAM L. DWYER, THOMAS S. ZILLY, and ROBERT S. LASNIK, District Judges.

COUGHENOUR, Chief Judge.

INTRODUCTION

More than one hundred habeas corpus petitions are currently pending in the Western District of Washington wherein aliens ordered deported to countries that have refused them admittance challenge the legality of their continued detention by the Immigration and Naturalization Service (INS). In an order dated April 22, 1999, the undersigned judges of the Western District designated five lead cases[1] that present issues common to all petitioners and directed the parties to brief and argue these common issues together; the remaining cases were stayed pending decisions in the lead cases.[2] The issues common to all petitioners have been thoroughly briefed by the parties, as well as by the American Civil Liberties Union and Northwest Immigrants Rights Project as amici curiae. Sitting en banc, we heard oral argument on the common issues on June 17, 1999.

Due to the great number of cases currently pending in this district that raise the same issue, namely whether INS detention of aliens ordered deported to countries that have refused them admittance violates substantive or procedural due process, we recognize the need to adopt a consistent legal framework to guide our

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[1] The five lead cases are *Phan v. Smith*, 56 F. Supp.2d 1158 (W.D. Wash. 1999); *Huynh v. INS*, 56 F. Supp.2d 1160 (W.D. Wash. 1999); *Batyuchenko v. INS*, C99-185R, —— F. Supp.2d —— (W.D. Wash. 1999); *Sivongxay v. INS*, 56 F. Supp.2d 1167 (W.D. Wash. 1999); and *Ma v. INS*, 10 56 F. Supp.2d 1165 (W.D. Wash. 1999).

[2] All cases filed after April 22nd that raise the same issues were similarly stayed pursuant to a supplemental order dated June 29, 1999.

individual consideration of these petitions. To that end, after carefully considering the written and oral arguments offered by all parties and amici, we have reached agreement on the analysis set out in this joint order. In the individual orders that follow, we evaluate the merits of each lead case in light of the framework established in this joint order.

I. GENERAL BACKGROUND

The five lead petitioners and the aliens whom they represent are lawful permanent residents of the United States who have been ordered deported to their native countries because they committed crimes designated by Congress as deportable offenses. The petitioners have been detained at various state and federal facilities by the INS since their orders of deportation became final. The INS has been unable to deport the petitioners, despite the final orders of deportation, because their countries of origin refuse to receive them. They nevertheless continue to be detained. As of the date of this order, the five lead petitioners have been detained between eight months and three years. All petitioners challenge the constitutionality of their continued detention on substantive and procedural due process grounds.

In this order, we consider our jurisdiction to entertain the pending habeas petitions and the government's exhaustion argument. Concluding that jurisdiction exists and that no exhaustion requirement bars reaching the merits, we turn to petitioners' constitutional claims, addressing the substantive due process claim first and then evaluating the constitutionality of the current INS detention procedures.

II. STATUTORY AND REGULATORY FRAMEWORK

Prior to 1996, after a final order of deportation had been entered, aliens generally could not be detained pending deportation for more than six months. Former INA § 242(c), 8 U.S.C. § 1252(c) (1994). Upon expiration of the six-month period, such aliens had to be released, but they remained subject to the supervision of the Attorney General. Former INA § 242(d), 8 U.S.C. § 1252(d) (1994).

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214 (enacted on April 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, 110 Stat. 3009-546 (enacted on September 30, 1996), both of which substantially revised the detention provisions of the INA. AEDPA § 440(c) amended § 1252(a)(2) to require the Attorney General to take into custody aliens convicted of aggravated felonies, controlled substance offenses, firearms offenses, and other serious crimes upon the release of such aliens from incarceration. 110 Stat. 1277, *amended by*, IIRIRA § 306(d), 110 Stat. 3009-612. AEDPA § 440(c) required the Attorney General to detain such aliens pending their removal from the United States.

Five months later, IIRIRA restored some release discretion to the Attorney General. The current procedural framework provides for mandatory detention of criminal aliens during removal proceedings, INA § 236(c), 8 U.S.C. § 1226(c) (1999), and for 90 days thereafter, during which time removal should generally

occur, INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (1999).[3] If removal cannot be accomplished during this period, the Attorney General retains discretion to continue to detain criminal aliens she determines "to be a risk to the community or unlikely to comply with the order of removal." INA § 241(a)(2) [*sic*], 8 U.S.C. § 1231(a)(6) (1999).

The implementing regulations delegate the Attorney General's discretionary release power to the INS District Director. 8 C.F.R. § 241.4; 8 C.F.R. § 236.1(d)(2)(ii). Under the regulations, to obtain release the alien must demonstrate "by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk." *Id.* In such circumstances, the District Director may in the exercise of his discretion either release the alien, or continue to maintain the alien in custody. *Id.* The regulation also lists nine non-exclusive factors that the District Director may consider in making such determinations.[4] The alien may appeal an adverse decision to the Board of Immigration Appeals. 8 C.F.R. § 236.1(d)(3)(ii).

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[3] These mandatory detention provisions apply to aliens who are deportable because they were convicted of a crime involving moral turpitude, an aggravated felony, certain firearms offenses, and other miscellaneous crimes. INA § 241(a)(2); 8 U.S.C. § 1231(a)(2) (1999).

[4] These factors are "(1) The nature and seriousness of the alien's criminal convictions; (2) Other criminal history; (3) Sentence(s) imposed and time actually served; (4) History of failures to appear for court (defaults); (5) Probation history; (6) Disciplinary problems while incarcerated; (7) Evidence of rehabilitative effort or recidivism; (8) Equities in the United States; and (9) Prior immigration violations and history." 8 C.F.R. § 241.4(a)(1)-(9).

The INS has recently implemented further policies related to "detention procedures for aliens whose immediate repatriation is not possible or practicable." *See* Pearson Memo, INS Ex. A (emphasis omitted). The guidelines found in the Pearson Memo provide for automatic review of post-final order detention cases before and after the expiration of the 90-day removal period. Additionally, the guidelines provide for mandatory review every six months thereafter to enable the District Director to "determine whether there has been a change in circumstances that would support a release decision." *Id.* The director can delegate the file review process-but not the decision-making function-to assistants. *Id.* Aliens have no right to appeal a release denial made pursuant to the Pearson Memo. *Id.*

III. JURISDICTION

As all parties concede, the general habeas corpus statute, 28 U.S.C. § 2241, provides the Court the authority to grant a writ of habeas corpus to a person held "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), and has historically afforded the jurisdictional basis for courts to review the constitutionality of executive detention. Petitioners' claims here fall squarely within § 2241. Therefore, this Court has jurisdiction to consider the constitutionality of their detention. *See Mayers v. INS*, 175 F.3d 1289, 1999 WL 317121 (11th Cir. May 20, 1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Henderson v. INS*, 157 F.3d 106, 118-22 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, —— U.S. ——, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999).

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

As a threshold matter, the government argues that the Court should decline to exercise its jurisdiction because petitioners have failed to exhaust their administrative remedies. More specifically, the government urges us to require petitioners to appeal the denial of their formal release requests before reaching the merits of their constitutional claims, suggesting that if petitioners' detention claims can be resolved through the administrative process, they should be.

While the INA contains no statutory provision requiring exhaustion, the Court may apply the doctrine if "sound judicial discretion" so advises. *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L.Ed.2d 291 (1992). It is true that the general policies underlying the exhaustion doctrine-to avoid premature interruption of the administrative process and to allow executive agencies to exercise their discretionary authority-would counsel in favor of an exhaustion requirement were the Court being asked to review discretionary determinations by the INS or other administrative findings of fact. *See, e.g., Lleo-Fernandez v. INS*, 989 F.Supp. 518, 519 (S.D.N.Y. 1998). But this is not what petitioners ask us to do. Rather, they ask us to decide whether their continued detention is lawful under applicable statutes and the Fifth Amendment. No administrative proceeding exists to consider these issues. Under the circumstances, no exhaustion requirement should be imposed. *McCarthy*, 503 U.S. at 144, 112 S. Ct. 1081; *see also Tam v. INS*, 14 F.Supp.2d 1184, 1189 (E.D. Cal. 1998).

Concluding that we have jurisdiction and petitioners need not exhaust administrative remedies, we now turn to petitioners' constitutional claims.

V. DUE PROCESS CLAIMS

The Due Process Clause of the Fifth Amendment to the United States Constitution protects the most basic and fundamental of human rights, ensuring that no person will be deprived of life, liberty or property without due process of the law. U.S. Const. Amend. V. Its protection extends to all "persons" within the borders of the United States, including deportable aliens. *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982). There is, however, one narrow exception to this rule. Based on what has become known as the "entry fiction,"[5] a number of cases have held that aliens who are placed in exclusion proceedings before entering the United States are legally considered to be detained at the border and are thus not entitled to due process protection. *Id.*; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc). As a result, the Due Process Clause affords an excludable alien no procedural protection beyond the procedure explicitly authorized by Congress, *see Mezei*, 345 U.S. at 212, 73 S. Ct. 625, nor any "substantive right

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[5] "*Mezei* established what is known as the 'entry fiction' which provides that although aliens seeking admission into the United States may physically be allowed within its border pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into the country." *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc) (citations omitted).

to be free from immigration detention." *Barrera*, 44 F.3d at 1450.

The entry fiction doctrine is inapplicable here. Petitioners are deportable-not excludable-aliens, and this distinction is critical. An excludable alien seeking admission "requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32, 103 S. Ct. 321. But "[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.* Petitioners fall into the latter category. No authority supports the government's position that aliens somehow "assimilate" to excludable status once they have been ordered deported, thereby relinquishing their constitutional rights.[6] Petitioners are all long-time permanent legal residents of the United States and, as such, are "persons" entitled to the protection of the Fifth Amendment, despite having been ordered deported.

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[6] The Supreme Court has held that a lawful permanent resident who leaves the United States then later seeks reentry may, upon his reentry, "assimilate" to the status of a continuously residing lawful permanent resident for purposes of his constitutional right to due process. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (permanent resident alien returning from five-month voyage abroad on Merchant Marine ship not subject to regulations permitting exclusion of arriving aliens without a hearing). The assimilation doctrine thus has been used to provide extra protection for resident aliens who have left the United States and who later seek reentry. No court in a published opinion, however, has ever used the assimilation doctrine to reduce the constitutional protection afforded lawful resident aliens who have never physically left the United States.

Turning to the merits, petitioners challenge their detention on both substantive and procedural due process grounds. We address first petitioners' substantive due process claim: only if a restriction on liberty survives substantive due process scrutiny is it necessary to consider whether the restriction is implemented in a procedurally fair manner. *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987).

A. SUBSTANTIVE DUE PROCESS

Above and beyond the procedural guarantee explicit in the Due Process Clause itself, federal courts have long recognized a limited "substantive" component that "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993). The Supreme Court has counseled restraint in recognizing a particular interest as deserving of substantive due process protection, *see Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992), and the analysis should begin "with a careful description of the asserted right." *Flores*, 507 U.S. at 302, 113 S. Ct. 1439.

The government argues that the interest at issue is petitioners' "right to be released into the United States pending [their] removal." But this definition construes petitioners' right too narrowly. The issue here is much more basic—it is simply the right to be at liberty. Put another way, at issue is petitioners' fundamental liberty interest in being free from incarceration. "Freedom

from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992). Petitioners' liberty interest is fundamental and deserving of due process protection.

As a general rule, government invasions of fundamental liberty interests are subject to strict scrutiny review: a deprivation will comport with due process only if it is narrowly tailored to serve a compelling government interest. *Flores*, 507 U.S. at 301-02, 113 S. Ct. 1439. Applying this standard of review in detention cases, courts consider whether the detention is "imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental interest." *Tam v. INS*, 14 F.Supp.2d at 1191(quoting *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1441 (5th Cir. 1993)); *Bell v. Wolfish*, 441 U.S. 520, 536-40, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979).[7] This requires the Court to consider the constitutionality of the detention in light of its purpose, and to ask whether the detention is based upon "permissible" regulatory goals of the government and, if it is, whether the detention is excessive in relation to those goals. *Martinez v. Greene*, 28 F. Supp.2d 1275, 1282 (D. Colo. 1998) (citing *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095); *Tam*, 14 F.Supp.2d at 1191 (quoting *Gisbert*, 988 F.2d at 1441); *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1025-26 (E.D. La. 1997).

Even so, argues the government, when reviewing immigration matters, the Court's power to inquire into

[7] The Ninth Circuit has held that immigration detention is not punishment. *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991).

alleged violations of petitioners' substantive due process rights is limited, and the Court should therefore apply a more deferential standard of review. The INS correctly states that the legislative and executive branches possess "plenary power" over immigration and naturalization, *Flores*, 507 U.S. at 305-06, 113 S. Ct. 1439, and that judicial deference to the political branches on these matters allows for greater flexibility to adjust policy choices to changing political and economic circumstances. *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976). Moreover, judicial deference allows the political branches to "'exercise especially sensitive political functions that implicate questions of foreign relations,'" *INS v. Aguirre-Aguirre*, —— U.S. ——, ——, 119 S. Ct. 1439, 1445, 143 L.Ed.2d 590 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110, 108 S. Ct. 904, 99 L.Ed.2d 90 (1988)), and recognizes that "[i]n the exercise of its broad power over nationalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 79-80, 96 S. Ct. 1883.

While the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention. Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a *means* by which the government implements Congress's directives. The dangers at which the detention scheme is directed, chiefly the prevention of flight and the protection of the community pending deportation of aliens who have been convicted of crimes, involve domestic interests rather than international concerns. Whether petitioners are detained or released on bond until the

government can facilitate their deportation does not raise foreign relations questions. Accordingly, the plenary power doctrine has far less force here than it does, for example, over decisions concerning who should or should not be admitted, or who should or should not be deported. Finally, detention threatens the deprivation of a fundamental liberty interest and thus clearly triggers "heightened, substantive due process scrutiny," not judicial deference. *Flores*, 507 U.S. at 316, 113 S. Ct. 1439 (O'[C]onnor, J., concurring). For these reasons, the Court finds that the plenary power doctrine does not support a deferential standard of review of petitioners' detention. Heightened scrutiny applies.

The government advances three regulatory interests, all of which satisfy the "permissible" standard: (1) ensuring the removal of aliens ordered deported; (2) preventing flight prior to deportation; and (3) protecting the public from dangerous felons. *See* 8 U.S.C. § 1231(a)(6). Clearly the government has a legitimate interest in securing the safe removal of aliens. Indeed, this is a primary objective of the INS: to decide which aliens may remain in the United States and which must leave, and to facilitate the safe and expeditious removal of aliens ordered deported. The latter two goals are incidental to this primary objective. Citing recent widespread recidivism and abscondence among criminal aliens, the INS contends it must retain the discretion to detain individuals such as the petitioners so that it can facilitate their safe removal. These also are "permissible" goals, but ones that derive solely from the power to deport.

The critical inquiry, therefore, is whether an alien's detention is *excessive* in relation to these government interests. In making this determination, we must necessarily balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released. In so doing, it becomes clear that as the probability that the government can actually deport an alien decreases, the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe. Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.

The foregoing provides the appropriate legal framework under which petitioners' substantive due process claims must be individually evaluated. For the lead petitioners, we perform this evaluation in their respective cases in the orders following this joint order. The remaining petitions shall be evaluated pursuant to the procedure set forth in the Conclusion, *infra*.

B. PROCEDURAL DUE PROCESS

The substantive due process analysis necessarily turns on the individual facts and circumstances presented by each petitioner. If, upon evaluating a petitioner's detention in light of the above substantive due process framework, it is concluded that there exists no constitutional deprivation, the Court would normally

then consider whether the procedures pursuant to which the petitioner is being detained pass constitutional muster. *See Salerno*, 481 U.S. at 746, 107 S. Ct. 2095. Unlike substantive due process, however, the procedures governing petitioners' detention are uniform; that is, the same procedural scheme applies to all. For this reason, we shall consider petitioners' procedural due process claims collectively in this joint order.

This analysis begins with the Due Process Clause of the Fifth Amendment, which entitles petitioners to procedural due process of law in their deportation proceedings. "The constitutional sufficiency of the procedures provided in any situation, of course, varies with the circumstances." *Plasencia*, 459 U.S. at 34, 103 S. Ct. 321 (citing *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981)). To determine what process is constitutionally mandated, the Court must review the existing procedural framework, then consider "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures." *Plasencia*, 459 U.S. at 34, 103 S. Ct. 321 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)).[8]

[8] In its supplemental response, the government contends that the *Mathews* test is inapplicable, and that petitioners' procedural due process claims should be judged instead under the *Flores* "(unexacting) standard of rationally advancing some legitimate governmental purpose." *See* INS Br. at 22. *Plasencia* governs, and dictates the applicability of the *Mathews* test. *Plasencia*, 459 U.S. at 34, 103 S. Ct. 321. The *Flores* Court found petitioners' procedural due process claims to be a restatement of the substantive due process claims, and rejected them on that basis without setting forth a new standard of review. *Flores*, 507 U.S. at 306-07, 113 S. Ct. 1439.

As stated above, the interest at stake is petitioners' freedom; as a fundamental right, this interest is clearly substantial. The government's interest in effectuating the safe removal of aliens ordered deported is also substantial, but as discussed above, this interest becomes less compelling as the probability of deportation decreases. The outcome thus hinges on the second part of the *Mathews* test: the risk of erroneous deprivation and the value of additional procedures.

The government defends the existing procedural framework as complying with due process. It points out that release decisions are based upon either the District Director's review of the alien's written submissions and administrative file or an interview with the alien and that the Director considers each of the nine factors set forth at 8 C.F.R. § 241.4 in making those decisions. This, the government submits, is more than sufficient process to ensure that only a minimal risk of erroneous deprivation of petitioners' liberty interest exists.

In response, petitioners and amici curiae assert that the procedural scheme as it now exists is structurally biased against meaningful review of petitioners' individual circumstances and therefore violates their procedural due process rights. "Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have

served their sentences, on the suspicion that they may continue to pose a danger to the community." *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996). This bias, petitioners urge, precludes an impartial review of their release requests, thereby denying them procedural due process.

Other courts faced with similar situations have expressed "little confidence" in release determinations by District Directors. *Cruz-Taveras v. McElroy*, 1996 WL 455012 (S.D.N.Y. Aug. 13, 1996); *Thomas v. McElroy*, 1996 WL 487953 (S.D.N.Y. Aug. 27, 1996); *Alba v. McElroy*, 1996 WL 695811 (S.D.N.Y. Dec. 4, 1996).[9] These courts found that instead of individually assessing dangerousness and flight risk, Directors simply relied on the aliens' past criminal history and the fact that they were facing removal from the United States, summarily concluding that the aliens posed such risks and denying them release. This does not meet the requirements of procedural due process.

We have similar concerns about the quality of the review afforded by the INS to the petitioners. Indeed, our review of the record confirms that the INS does not meaningfully and impartially review the petitioners' custody status. The absence of any individualized assessment or consideration of the petitioners' situations in light of the pertinent factors set forth in the regulations violates their procedural due process rights. At a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation. The immigration judge must actually consider the factors set forth at 8 C.F.R. § 241.4 and explain how they apply to each petitioner's unique circumstances. Petitioners also must be able to appeal any adverse denial of a release request to the BIA. The risk of erroneous deprivation of a petitioner's liberty interest is too great to deny him or her anything less than the full procedural protections available under the Constitution.

[9] These cases concern parole hearings for lawful permanent residents who left the United States temporarily and upon their return were placed in exclusion hearings. The statutory scheme at issue there required mandatory detention of aliens convicted of aggravated felonies during the pendency of their exclusion proceedings. Because petitioners are entitled to discretionary release by INS officials, however, the structural bias arguments raised in those cases are equally applicable here.

CONCLUSION

In the orders that follow, we individually apply the due process framework in the lead cases to determine whether continued detention violates the petitioner's right to substantive due process. The Court shall provide for expedited review of the remaining petitions that have been stayed pursuant to the April 22nd and June 29th orders. To that end, the government is directed to file a status report and recommendation in each of the stayed cases *within twenty (20) days of entry of this order*. These reports shall evaluate each petitioner's situation in light of the above framework. Counsel for each petitioner may file a response in the respective case *within ten (10) days thereafter*. Each judge shall then consider the petitions pending before him or her according to the above framework and in light of the arguments provided by the parties in the status report and the response thereto.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

No. C99-151L

KIM HO MA, PLAINTIFF

v.

IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

July 13, 1999

ORDER SETTING HEARING

LASNIK, District Judge.

Kim Ho Ma's petition for a writ of habeas corpus and four others were designated "lead" cases in this district for the purpose of joint consideration of the government's indefinite detention of certain deportable aliens.[1] This order incorporates the Court's Joint Order and applies the analysis in that order to Mr. Ma's case.[2]

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[1] *See* Order on Lead Cases, and Stay of Related Cases, entered 4/22/99.

[2] *See* Joint Order, entered 7/9/99.

Ma entered the United States as a Cambodian refugee in 1985 at age 7, and became a lawful permanent resident in 1987. In 1996 he was convicted of first degree manslaughter, for which he served two years incarceration. He was then released to the Immigration and Naturalization Service, which began deportation proceedings. In September 1997 the INS ordered Ma removed as an aggravated felon. An Immigration Judge denied his requests for release on bond in October and December 1997. In both instances the Immigration Judge found that Ma was not a flight risk, but was a danger to the community. (AR 93, 41). Ma's appeal to the BIA was denied in October 1998. (AR 4). He has been in INS custody since June 1997, and subject to a final order of deportation since October 1998. The United States appears not to have requested travel documents for Ma from the Cambodian government.

As discussed in the Joint Order, deportable aliens like Ma are entitled to substantive due process under the Fifth Amendment. The government's continued detention of Ma violates his right to substantive due process if it is excessive in relation to the government's interests in effectuating his deportation. *See United States v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987); *Martinez v. Greene*, 28 F.Supp.2d 1275, 1282 (D. Colo. 1998); *see also* Joint Order at 9. This inquiry requires the Court to weigh Ma's interest in liberty against the government's interests in effectuating his removal, preventing his escape, and protecting the public. While it is clear that Ma's interest in liberty is strong, the government's interests depend upon the likelihood that it can *ever* complete Ma's deportation. *See* Joint Order at 9.

The record is not clear whether the government is likely to accomplish Ma's deportation. Although there is no evidence that the government has even requested the assistance of the Cambodian government, Ma's final order of deportation is only eight months old. There is little or no indication in the record whether Cambodia is likely to accept Ma, were it asked to do so. And the government raises but does not explain Mr. Ma's "pending Torture Convention claim." I.N.S. Brief at 10. These issues are critical to determining the weight of the government's interests in Ma's continued detention.

Accordingly, the Court will schedule a hearing in this matter. The parties are directed to contact this Court's deputy clerk to schedule such a hearing.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

No. C99-151L

KIM HO MA, PLAINTIFF

v.

JANET RENO, ATTORNEY GENERAL, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, AND RICHARD COHEN, DISTRICT DIRECTOR, SEATTLE DISTRICT, DEFENDANTS

[Filed: Sept. 29, 1999]

ORDER GRANTING WRIT OF HABEAS CORPUS

This matter comes before the Court on Kim Ho Ma's petition for a writ of habeas corpus ordering his release from detention by the Immigration and Naturalization Service (INS). Having considered the materials filed by petitioner, the government, and amici curiae, and the parties' oral arguments and supplementary briefing, the Court hereby grants the petition and orders petitioner released from custody.

INTRODUCTION

Petitioners' case was designated by this Court as one of five "lead" cases because it raises issues common to many similar petitions pending in this district. Petitioner has been ordered deported to a country that will not accept him, and claims his continued detention by the INS is indefinite, and therefore unconstitutional. The Court convened oral argument on the lead cases, and on July 9, 1999 issued a joint order signed by the five active judges in this district. That joint order determined threshold issues and set out a framework for analyzing petitioners' claims that their continued detention violates their due process rights. This order applies that framework to petitioner Ma's case.[1]

BACKGROUND

Petitioner was born in Cambodia in 1977, and entered the United States as a refugee in 1985. He became a lawful permanent resident in 1987. At age 17, he was involved, with three other members of a gang known as the Local Asian Boyz, in the killing of another gang member. In 1996, he was tried as an adult on a charge of murder in the first degree. The jury acquitted him of first degree murder, hung on the charge of second degree murder, and convicted Ma of first degree manslaughter. He completed his sentence and was then transferred to INS custody. In September 1997, the INS ordered him to be removed from the United States as an aggravated felon. *See* 8 U.S.C.A. §§1227(a)(2)

[1] This Court will adhere to the joint order, despite the government's suggestions to the contrary.

(A)(iii), 1101(a)(43) (1999). Petitioner's appeal to the Bureau of Immigration Appeals (BIA) was denied, and his order of deportation became final October 26, 1998. *See* Administrative Record at 4, 5.

An immigration judge denied petitioner's request for release on bond in October and December 1997. In both instances the Immigration Judge found that petitioner was not a flight risk, but was a danger to the community strictly because of the seriousness of his crime. AR 40, 93. In May 1999, the INS conducted a "90 Day Custody Review" in Ma's case. An INS deportation officer interviewed petitioner and reviewed letters and other materials submitted by his family and friends. An assistant director then apparently reviewed the deportation officer's report and issued a decision in June denying release.[2] Under new custody review procedures, this decision may be reviewed at INS Headquarters, but to date it has not been so reviewed. *See* Respondents' Exhibit CC (filed under "Praecipe" 9/9/99).

Following entry of the Court's joint order in this case, this Court set a hearing to take additional evi-

[2] The decision was expressed in a form letter. It reads in part, "I have determined that until you are removed from the United States you shall continue to be detained in custody of the Service. In reaching this decision I considered the nine factors listed below. I have also taken into consideration any material or statements that you may have submitted during the review process. There is no appeal from this decision. Your case will be reviewed again on December 2, 1999. This letter constitutes notice of that review. You will receive no further notice." *See* Respondents' Exhibit BB. Although the letter does not say what factors informed the decision to deny petitioner's release, it lists the criteria prescribed by the Attorney General for such decision. *See* 8 C.F.R. §241.4 (1999).

dence regarding the likelihood of Ma's deportation to Cambodia. By stipulation, the parties have filed written materials on this and other issues in lieu of a hearing, and the record is now complete.

ANALYSIS

The Court has concluded that the government's continued detention of Ma violates his right to substantive due process if it is excessive in relation to the government's interests in effectuating his deportation. *See* 7/13/99 Order at 2 (citing *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Martinez v. Greene*, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998); Joint Order at 9). Pursuant to the Court's joint order, this requires the Court to "weigh Ma's interest in liberty against the government's interests in effectuating his removal, preventing his escape, and protecting the public." *Id.*

As a preliminary matter, the Court notes that the government's earlier suggestion that Ma had a pending claim under an international torture convention was mistaken. In another clarification, the government notes that it has in fact requested travel documents for Ma from the Cambodian government, by letter of May 5, 1999. There has apparently been no response. "For some time now, Cambodia has failed to issue travel documents to Cambodian nationals orderd removed from the United States." Respondents' Status Report and Recommendation at 8.

It appears that the government's successful removal of aliens to Cambodia will require a formal repatriation agreement between the two countries. The government claims that negotiation of such an agreement "is related to the status of negotiations between the United States and Vietnam." *Id.* at 9. The government submits a declaration by an officer of the State Department—an advisor on East Asian affairs named James Hergen—that summarizes the negotiations between the United States and Vietnam on the topic of repatriation, spanning the past four or five years. Respondents' Exhibit AA. Hergen notes that the Deputy Secretary of State recently " permit[ted] negotiation of similar agreements with Cambodia and Laos, should that be appropriate." *Id.* at ¶ 12. Hergen has recommended initiating such negotiations promptly. *Id.* at ¶ 13. Petitioner's counsel reports that on September 4, 1999, officers of the State Department met with officers of the Cambodian Consulate in Washington, D.C. to discuss the government's preliminary proposals for a repatriation agreement. Petitioner's Exhibit B at ¶ 6. The Consulate plans to send a report on the meeting, with the American proposal, to the Cambodian government. *Id.*

Ma's deportation to Cambodia is far from imminent. The evidence shows that the government has taken only the first step toward enabling deportations to Cambodia. Even the government says negotiations with Cambodia are dependent upon negotiations with Vietnam. Two judges of this Court have recently held that current negotiations with Vietnam do not establish a realistic chance of deporting Vietnamese nationals. *See Huynh v. Reno*, No. C99-177C (W.D. Wash., July 9, 1999); *Phan v. Smith*, No. 98-234Z (W.D. Wash., July 9,

1999). Similarly, there is not a realistic chance that the government will accomplish Ma's deportation to Cambodia. His indefinite detention therefore violates his right to substantive due process.

Even if there were a realistic chance of deporting Ma, the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a danger to society, beyond the simple fact of his conviction.[3] While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention.[4] The record does not indicate his release with proper parole conditions would endanger the community.

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[3] The District Director's decision, as noted above, provides no reasons for denying Ma's release. The report upon which he relied, however, contains abundant information about Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior, all of which oppose a finding of future dangerousness. *See* Respondents' Exhibit BB. This report also demonstrates that Ma's only "behavioral problems" in detention was his planned participation in a hunger strike, and that his "history of gang activities" consists of the gang-related shooting for which he was convicted. *See* Respondents' Status Report and Recommendation at 8, 29.

[4] Ma was only 17 years old at the time of his crime. The jury did not see his role in the crime to be as clear-cut as the government suggests, and the judge who presided over the trial sentenced Ma to only 38 months. The sentence could have been up to 41 months in the standard range, and 120 months in an exceptional sentence for aggravating circumstances.

CONCLUSION

Thus, Ma's interest in liberty clearly outweighs the government's present interests in detaining him. His continued incarceration is excessive in relation to the government's objectives, and therefore violates his Fifth Amendment right to substantive due process.[5] Ma's petition for writ of habeas corpus is granted, and respondents are hereby ordered to release him, subject to appropriate conditions.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 29th day of September, 1999.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District Judge

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[5] The Court does not address the questions regarding procedural due process further in this order, as it is unnecssary to resolving Ma's petition.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35976

D.C. No. C-99-151-L

KIM HO MA, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; ROBERT COLEMAN, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, SEATTLE, WASHINGTON; AND THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS-APPELLANTS

[Filed: June 2, 2000]

ORDER

Before: REINHARDT, THOMPSON, T.G. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX F

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 90/16.51

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

Feb. 3, 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety [90] day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Director.

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of post order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody reviews. The District Director may use information obtained by local staff or detailees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation.

Every six months, the District Director must review the status of aliens detained beyond the removal period

to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.5.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4.

8 C.F.R. § 241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(1)(C), 237(a)(1)(C) [*sic*], 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 236(c). *See* October 7, 1998 memorandum entitled *INS Detention Use Policy*.

APPENDIX G

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

Aug. 6, 1999

MEMORANDUM FOR All REGIONAL DIRECTORS
District Directors
Office of Field Operations

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.[1] Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or

[1] See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, and April 30, 1999: *Supplemental Detention Procedures*.

release such an alien is made by the District Director. In the near future, the Service will begin the rule-making process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is

later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to a Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

(1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a

custody review of administratively final order removal cases *before* the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.

(2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1)-(3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F.R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

(3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be con-

sidered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.

(4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.

(5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. *See* 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. *See* INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the pre-

liminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do

so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

(a) Notice to Alien
(b) Notice of Interview
(c) Detained Alien Custody Review Worksheet
(d) Decision of Custody Review
(e) Decision to Continue Detention
(f) Decision to Release
(g) Custody Review Status Report

APPENDIX H

[Seal omitted]

U.S. Department of Justice
Immigration and Naturalization Service
Western Region, Seattle District

Office of the District Director

813 Airport Way South
Seattle, WA 98134
206-553-0719
Fax 206-553-0936

June 2, 1999

Name: Kim Ho MA, A27 365 395
Address: Regional Justice Center/King County Jail

Dear Mr. MA:

An officer of this Service recently reviewed your case. The officer has presented the results of that review to me so that I may make a decision regarding your custody status.

Pursuant to the authority contained in Sections 236 and 241 of the Immigration and Nationality Act, and parts 236 and 241 of the Code of Federal Regulations, I have determined that until you are removed from the United States you shall continue to be detained in custody of this Service.

In reaching this decision I considered the nine factors listed below. I have also taken into consideration any material or statements that you may have submitted during the review process. There is no appeal from this decision.

Your case will be reviewed again on *December 2, 1999*. This letter constitutes notice of that review. You will receive no further notice.

You may at any time submit to the District Director a request for redetermination of your custody status. That request must be supported by evidence that you will appear for all future immigration proceedings and that your presence in the community does not represent a hazard to anyone. If you have been convicted of criminal offenses the evidence must be clear and convincing. Evidence must be presented in writing to the District Director through the officer handling your case.

FOR THE DISTRICT DIRECTOR

/s/ GEORGE L. MORONES
GEORGE L MORONES
Assistant District Director for
Detention and Deportation
Seattle, Washington

[ ] cc: Attorney of Record or Representative

Factors considered during custody review

(1) The nature and seriousness of the alien's criminal convictions
(2) Other criminal history;
(3) Sentence(s) imposed and time actually served;
(4) History of failures to appear for court (defaults);
(5) Probation history;
(6) Disciplinary problems while incarcerated;
(7) Evidence of rehabilitative effort or recidivism;
(8) Equities in the United States; and
(9) Prior immigration violations and history.

90 DAY CUSTODY REVIEW

Sections in red are mandatory with each review. Sections in blue require entry only upon first review or when there is any subsequent change. Blocks will automatically expand to fit text as it is entered. Tab from cell to cell to fill in data, then print. If you want to save the form, change the name then save it to a directory in your computer.

Reviewing Officer: Michael A. Melendez

Date: May 6, 1999

Personal Data & Factors

A Number: A27 365 395

Last Name: MA First Name: Kim Ho

DOB: 07/06/77 Nationality: Cambodia

Martial Status: Single

Spouse USCLPR? N/A

Minor Children? N/A

Other family factors? The Subject's father, mother and two brothers reside in the Seattle area. He also has an Aunt and Uncle who also reside in the Seattle area as well.

INS History

Entry Data: 04/26/85
LPR Since: 01/21/87
Deportation Charge: 237(a)(2)(A)(iii)
IJ Dec. Date: 09/12/97

BIA Dec. Date: 10/26/98
App. Court Dec. Date: N/A
Into Custody On: 06/06/97 Agg. Fel (Y/N): Y

Previous INS Bond? Date: N/A Amount: N/A
Disposition: N/A

Detention Category 1
Does detainee have a history of violence? Y
If yes, explain here: Subject was convicted
Manslaughter in the 1st Degree.

Criminal History (*add separate sheet if necessary, or RAP sheet*)

				Agg Felony?
Date	Court/Location	Convicted of	Sentence	(y/n)
3/1/96	Superior/King Co.	Manslaughter in the 1st Degree	38 Months	Y

Institutional History – Positive or Negative (*Comment required - "Nothing significant" is acceptable*)

On 10/20/97, the Subject was transferred to King Co. Jail, Seattle, WA. for his involvement in a planned Hunger Strike that occurred while in Service custody.

Medical/Mental History (*Comment required –"Nothing significant" is acceptable*)

Nothing Significant

Community Concerns

Subject was a member of the "Local Asian Boyz" (LAB) in the Seattle area and was convicted of Manslaughter in the 1st Degree. Subject has no other criminal record.

Officer Comments

(If there has been contact or correspondence with the detainee, family, or attorney, synopsize & assess here. Also, particularly address efforts to obtain travel documents and alien's efforts to assist or impede obtaining them.)

The Subject is a native and citizen of Cambodia who entered the United States as a Refugee on or about April 26, 1985. He was accorded the status of a permanent resident on January 21, 1987. On March 1, 1996, he was convicted of Manslaughter in the 1st Degree in the Superior Court of Washington for King County. For that offense, the term of imprisonment imposed was 38 months.

On June 6, 1997, the Subject was processed into Service custody. He was then ordered removed by the Immigration Judge on September 12, 1997. He reserved appeal to the BIA and on October 26, 1998, the BIA dismissed the appeal. On May 5, 1999, the Service requested a Travel Document from the Consulate General of Cambodia in order to facilitate the Subject's removal. The Subject did not impede our procedure in obtaining a Travel Document. We have not received a response from the Consulate General of Cambodia on the outstanding Travel Document.

On October 20, 1997, he was transferred to King County Jail/Seattle for his involvement in a planned Hunger Strike within the Service Detention Center. He was identified as one of the more vocal detainees within the dorms. The Subject was housed at King County Jail/Seattle for over a year before being transferred to the Immigration Pod within King County

Jail/Regional Justice Center. While housed within King County Jail/Seattle, there was no record of any behavioral problems.

When given the opportunity to make an oral statement in regard to his custody review, the Subject along with his attorney Jay Stansell, emphasized the following topics:

- The Subject was convicted of Manslaughter in the 1st Degree on 03/01/96. He was sentenced to 38 months, but only served 26 months in the Washington State Department of Corrections System. This was his only criminal conviction both as a juvenile and adult.

- The Subject was 17 years old when he was convicted of Manslaughter in the 1st Degree. When he was 19 years old he was transferred into Service custody on 06/06/97. Now he is 21 years old and has been incarcerated for 47 months. This is combining both time served with the State Department of Corrections (DOC) and INS.

- If released the Subject plans on completing his education by obtaining a GED. He was in the 10th grade when he was convicted of Manslaughter in the 1st Degree. He was given the opportunity to complete courses towards obtaining a GED while incarcerated with the State DOC but he was transferred to another facility. At the other facility he was not afforded the opportunity to complete courses towards obtaining a GED.

- He also stated that if released he would like to "Educate" not only his brothers but also his community on the consequences of committing criminal activity. He was not afforded this knowledge when he was a teenager growing-up in a predominantly African American community. He further noted that growing-up in a community where he was in the minority, constantly being picked on by the majority, they had to bond together in order to stand-up for themselves.

- He was a member of the Local Asian Boyz (LAB), affiliated in the Seattle area. This gang affiliation provided him feeling of acceptance that he was not obtaining from his community. When he was questioned on his current affiliation with the LAB's he proceeded to affirm that there is "No" affiliation at this time and that there would be no affiliation if released.

- Please refer to the Officer's Comments Continuation Sheet.

OFFICER'S COMMENTS CONTINUATION

- The Subject's family is very supportive. They visit him every Sunday and have provided the Service with letters affirming their support for their son and requesting his release from custody. His father is 71 years old and handicapped. If released, it would allow him to assist his father in his everyday activities that are difficult for him.

- The Subject further emphasized about his relationship with both of his brothers. He has one brother who is 15 years old and is in constant communication with him. His brother looks to the Subject as a guide for him. The Subject is very involved with his brother's activity both in school and within the community. This is to ensure that he does not follow in his footsteps and to value the opportunity that he has here in the United States. His brother has expressed that he would like to become a Youth Counselor in the future.

- The Subject's second brother is 31 years old and runs his own business. His brother has a job waiting for him if released from Service custody.

The Subject completed by stating that he has served more time with INS than he did for the crime for which he was convicted. He would also like to have the opportunity that was never given to him which is to be released from custody and prove that he is not a threat to society, as it is today.

The Subject's family and members of his community have provided letters of support requesting that he be released from Service custody. There is also a letter offering employment from his brother if released.

Officers are referred to 8 CFR 241.1 for an extensive list of factors to be considered by the DD in reaching a decision to continue in custody, or release an alien during the past-90 day review period.

Supervisory Review by B. Brown on 5-24-99
Supv. Comment:

/s/ [Illegible]
Supervisory Signature

ACTION BY DISTRICT DIRECTOR

D.D. Comment:

Schedule psych evaluation prior to next review

District Director Decision: (check one):

[x] Continue to detain pursuant to 8 CFR 241.4.

[ ] Release under Order of Supervision pursuant to 8 CFR 241.4

Conditions: Bond in the amount of $ _____

Other: [ ] All conditions listed under 8CFR241.5(a)

Except 241.5(a) [ ] & [ ] & [ ]

[ ] and

[ ] Employment authorized

For the District Director

/s/ GEORGE L. MORONES
GEORGE L. MORONES
Assistant District Director,
Detention & Deportation

Date 6/15/99

APPENDIX I

September 29, 1999

George Morones
Supervisory Deportation Officer
Detention & Deportation
Seattle District Office
attn: Natalie Asher

Mr. Morones:

Attached please find our review of Kim Ho Ma, A27 365 395. As you can see, Mr. Curi and I were in concurrence in recommending that this individual remain incarcerated pending further review.

Said decision was predicated in large part due to the nature of his criminal record (1st degree manslaughter), as well as his institutional record. In light of this, we were unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release were we to have rendered a favorable recommendation.

Should you have any questionsor [*sic*] require additional information, please contact me at (202) 616-7783 or e-mail.

Thank you

/s/ ROBERT A. MATTEY
ROBERT A. MATTEY JR.
Staff Officer HQ D&D
Cuban Review Program
Washington, D.C.

INS "A" NUMBER A 27 365 395 BOP REG NUMBER *N/A*
NAME Kim Ho Ma
PANEL REVIEW DATE 05-06-1999
PLACEMENT CODE _____

1. IT IS RECOMMENDED THAT THIS DETAINEE BE
(XXX) DETAINED BECAUSE:
( ) RELEASED

A careful review of Mr. Ma's criminal record reveals that he was arrested and convicted on or about 03-01-1996 for 1st degree manslaughter, for which he was sentenced to serve 38 months. Subsequent to his incarceration, he participated in a hunger strike on 10-27-97 while incarcerated in the King County Jail in Seattle, Washington. Given the assaultive nature of the above-mentioned criminal offense, it is the recommendation of this panel member that he remain incarcerated pending another review.

/s/ ROBERT MATTEY
ROBERT MATTEY
SIGNATURE COMMITTEE MEMBER

ROBERT A. MATTEY JR.
PRINT NAME OF MEMBER

09-30-99
DATE

2. IT IS RECOMMENDED THAT THIS DETAINEE BE
( ) DETAINED BECAUSE:
( ) RELEASED

/s/ TOMAS CURI
TOMAS CURI
SIGNATURE COMMITTEE MEMBER

TOMAS CURI
PRINT NAME OF MEMBER

9/30/99
DATE

While detainee has had strong family support, his crime, and detention incident precludes this writer from assuming he will remain non-violent, or abide by conditions of his parole if released.

APPENDIX J

Section 241.4 of Title 8 of the Code of Federal Regulations provides:

§ 241.4 Continued detention beyond the removal period.

(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) *Continuation of custody for other aliens.* Any alien removable under any section of the Act other than section 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Supreme Court, U.S.
FILED
AUG 31 2000
CLERK

(3)

No. 00-38

In The Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONERS

v.

KIM HO MA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

THOMAS W. HILLIER, II
Federal Public Defender
for the Western District of Washington

JAY W. STANSELL
Assistant Federal Public Defender
Counsel of Record

JENNIFER E. WELLMAN
Staff Attorney

1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100
Counsel for Respondent

78pp

QUESTION PRESENTED FOR REVIEW

Kim Ho Ma was six years old when he lawfully entered this country fifteen years ago as a refugee from Cambodia. He became a lawful permanent resident of the United States after that entry but was ordered deported to Cambodia following his conviction of manslaughter in 1997. The Immigration and Naturalization Service (INS) was unable to effectuate his deportation because Cambodia refused to allow his return. However, the INS chose to detain Mr. Ma for almost a year beyond the statutory 90-day removal period (8 U.S.C. § 1231(a)(1)(A)) until the district court ordered him released. The INS maintains that Mr. Ma's detention should continue indefinitely even though they cannot deport him in the foreseeable future, if ever. The governing statute, 8 U.S.C. § 1231(a)(6), provides: "An alien ordered removed . . . who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." The Ninth Circuit Court of Appeals, applying normal tenets of statutory construction and the well-established principle of constitutional avoidance, held that the Attorney General does not have the statutory authority under § 1231(a)(6) to detain Mr. Ma beyond the 90-day removal period where his deportation cannot be effectuated in the reasonably foreseeable future.

The question presented is:

Whether, under 8 U.S.C. § 1231(a)(6), the Attorney General has the statutory authority to indefinitely detain a long-time resident alien of the United States beyond the 90-day removal period even if the deportation order cannot be effectuated in the reasonably foreseeable future?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-38

JANET RENO, et al., PETITIONERS
v.
KIM HO MA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

OPINIONS BELOW

The petition for *certiorari* correctly cites the district court opinion ordering an evidentiary hearing, reported at 56 F. Supp. 2d 1165 (W.D. Wash. 1999), App. C to Pet. for Cert. 52a-54a, the district court opinion granting Mr. Ma's writ of habeas corpus, which is not reported, App. D to Pet. for Cert. 55a-61a, and the April 10, 2000, reported Court of Appeals for the Ninth Circuit opinion affirming the district court order, 208 F.3d 815 (9th Cir. 2000). App. A to Pet. for Cert. 1a-33a. The June 2, 2000, opinion of the court of appeals denying rehearing and rehearing en banc is not reported. App. E to Pet. for Cert. 62a-63a.

The district court opinion denying the Petitioners' motion to stay Mr. Ma's release pending their appeal to the court of appeals is not reported. App. A, *infra*, 1a-3a. The court of appeals opinions denying motions to stay Mr. Ma's release pending appeal to the court of appeals are not reported. App. B, *infra*, 4a-5a. The court of appeals' opinion denying the Petitioners'

motion to stay Mr. Ma's release pending their application to the Supreme Court to stay Mr. Ma's release is not reported. App. C, *infra*, 6a. The Supreme Court's order denying the Petitioners' application to stay Mr. Ma's release pending their appeal is reported at 528 U.S. --, 120 S.Ct. 466 (1999). App. D, *infra*, 8a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. § 1231(a)(6), 8 C.F.R. §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Ma's release is 8 U.S.C. § 1253(b) which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT[1]

Kim Ho Ma lawfully entered the United States years ago but was convicted of a crime in 1997. Following completion of his sentence, he was taken into Petitioner INS's custody and ordered deported. However, the INS was unable to effectuate his deportation because Cambodia

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[1] Mr. Ma has confined the following Statement to those facts which are either inaccurately stated in, or omitted from, the recitation of facts in the petition for *certiorari*. The court of appeals' opinion correctly sets forth the facts of the case and the procedural background. Ma v. Reno, 208 F.3d 815, 818-20 (9th Cir.), reh'g and reh'g en banc denied (June 2, 2000). And for the convenience of the Court, Mr. Ma has cited to the reported circuit and district court decisions as they appear in the Appendix to the Petition for *Certiorari*.

refused to accept his return. Despite its inability to deport Mr. Ma or estimate a time in the future when his deportation could be effectuated, the INS continued to detain him. Petitioners contend that they have the authority to detain Mr. Ma indefinitely even though his deportation order cannot be effectuated. Mr. Ma challenged that position by writ of habeas corpus on statutory and constitutional grounds. Both of the lower courts ruled in Mr. Ma's favor. The court appeals held that the INS has the statutory authority to detain an individual like Mr. Ma beyond the 90-day removal period only for a "reasonable time" in order to effectuate deportation. App. A to Pet. for Cert. 31a. The circuit court stated,

> [i]n cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, . . . the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

Id. at 11a; see also id. at 31a.

The court of appeals reasoned that the Petitioners' construction of the statute -- which would permit the indefinite, potentially lifetime detention of Mr. Ma even though his deportation order cannot be effectuated -- raised serious constitutional problems. App. A to Pet. for Cert. 11a-24a; see also App. D to Pet. for Cert. 61a (granting writ on constitutional grounds). Consistent with well-established rules of statutory construction, the circuit court construed the statute to avoid such problems. App. A to Pet. for Cert. 11a-24a. Because its analysis was dispositive of the Petitioners' appeal, the circuit court did not reach the alternative constitutional claims. Id. at 22a. Accordingly, the question presented by this case is simply whether the statute, § 1231(a)(6), permits Mr. Ma's indefinite detention even though his deportation order cannot be

effectuated in the reasonably foreseeable future.[2]

A. Kim Ho Ma and INS Custody.

Kim Ho Ma and his family fled Cambodia when Mr. Ma was only two years old. They entered the United States lawfully as refugees four years later in 1985 when Mr. Ma was six years old. Mr. Ma became a lawful permanent resident in 1987 and has continuously resided in this country since his entry. App. A to Pet. for Cert. 4a.

At the age of seventeen, Mr. Ma was convicted of first degree manslaughter, and served 26 months of a 38-month sentence with time off for good behavior. Rev. Code Wash. 9.92.151 (1990); App. D to Pet. for Cert. 5a.[3] In June of 1997, the INS took Mr. Ma into custody after he

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[2] Under the court of appeals' legal analysis, the critical inquiry is whether the deportation order can be effectuated in the "reasonably foreseeable future," not whether the individual's removal will happen "immediately" or whether his detention is permanent, as suggested in the petition for *certiorari*. App. A to Pet. for Cert. 31a.

Similarly, the Petitioners' incorporation of "flight risk" and "danger to the community" into the question presented further misstates the statutory analysis of the circuit court. These factors have no relevance to the statutory analysis but pertain only to the constitutional question -- whether such detention is excessive in relation to a legitimate government purpose. See, e.g., App. D to Pet. for Cert. 60a; App. B to Pet. for Cert. 47a. See also generally United States v. Salerno, 481 U.S. 739, 746-49 (1987); Kansas v. Hendricks, 521 U.S. 346, 358 (1997). For this same reason, the Petitioners' heavy reliance on the existence of an administrative custody review process and incorporation of that fact into the question presented is misplaced. Moreover, these factors (of flight risk or danger to the community) have no relevance in this case because "the government has never suggested [Mr. Ma] is a flight risk" and there is no evidence of present danger to the community. App. D to Pet. for Cert. 60a & 60a n.3 & n.4; see also, *infra*, pp. 4-10, 10 n.12, 24-25.

[3] The Petitioners' description of Mr. Ma's conviction in the petition for *certiorari* as an intentional offense is inaccurate. It is apparently drawn from the affidavit of probable cause supporting the state's charges of murder in the first degree and murder in the second degree, charges on which Mr. Ma was not convicted. Certified Administrative Record (AR) 144-148. Although Mr. Ma was only 17 years old when convicted, he "was tried as an adult on a charge of murder in the first degree. The jury acquitted him of first degree murder, hung on the charge of second degree murder, and convicted [Mr.] Ma of first degree manslaughter." App. D to Pet. for

completed his state sentence. Pending completion of the deportation proceedings, an Immigration Judge determined that Mr. Ma was not a flight risk but nevertheless denied the request for bond "strictly because of the seriousness of his crime." App. D to Pet. for Cert. 57a. Subsequent requests by Mr. Ma for release on bond pending completion of his deportation proceedings were denied solely because of Mr. Ma's manslaughter conviction, which is his only criminal conviction. App. A to Pet. for Cert. 5a.[4]

Mr. Ma does not contest the validity of his deportation order to Cambodia, which was entered on September 12, 1997, and affirmed by the Board of Immigration Appeals (BIA) on October 26, 1998.[5] App. A to Pet. for Cert. 4a.[6]

Cert. 56a & 60a n.4. Manslaughter in the first degree is statutorily defined in Washington as "recklessly caus[ing] the death of another person," with a maximum possible sentence of 10 years and a sentencing range of 31 to 41 months based on Mr. Ma's criminal record of no prior convictions. Rev. Code Wash. 9A.32.060 (1975); Rev. Code Wash. 9.94A.320 (1995); Rev. Code Wash. 9.94A.310 (1995).

[4] The psychological evaluation referenced in the petition for *certiorari*, Pet. for Cert. 6 & n.2, was performed in 1997 by the Department of Corrections, not the INS, and was not relied upon by the INS to support its conclusion that Mr. Ma posed a danger to the community if released pending removal to Cambodia. App. H to Pet. for Cert. 77a-86a; AR 49-54. The dated report nevertheless characterized Mr. Ma as a "frightened boy" who could be released with supervision. AR 49-54. And, as instructed by the author of the 1997 report, "caution is indicated in generalizing from the information provided in this report. Psychological test data alone have not been found adequate as predictors of an individual's behavior in a setting different from the testing situation." AR 54. The INS itself concluded two years later that Mr. Ma has no "significant" mental health issues. App. H to Pet. for Cert. 80a.

[5] Mr. Ma's applications for asylum and withholding were denied based on the Immigration Judge's finding, which was affirmed by the BIA, that Mr. Ma was ineligible for such relief, in light of his conviction for a crime classified by 8 U.S.C. § 1101(a)(43)(F) (1996) as an aggravated felony. App. A to Pet. for Cert. 4a.

[6] While Mr. Ma does not disagree that the final order of deportation eliminated Mr. Ma's lawful permanent residence status, 8 C.F.R. § 1.1(p), he does dispute any suggestion by the Petitioners that this change in Mr. Ma's immigration status strips him of, or otherwise defines his

As noted in the petition for *certiorari*, the INS could not effectuate Mr. Ma's deportation to Cambodia within the 90-day removal period. Over six months after Mr. Ma's removal order became final (and after his habeas petition was filed), the INS requested travel documents from the Cambodian government. App. A to Pet. for Cert. 5a. The INS never received a response because Cambodia ignores or refuses to grant such requests as a matter of course, absent a repatriation agreement with the United States. App. A to Pet. for Cert. 5a & n.4; see also App. D to Pet. for Cert. 58a (quoting pleadings by Petitioners' herein regarding Cambodia's failure to issue any travel documents); App. E, *infra*, 9a-11a. And despite the United States' ongoing negotiations to reach such an agreement, no such agreement currently exists. App. D to Pet. for Cert. 58a-59a. In July and September of 1999, the Consulate of Cambodia confirmed that Cambodia would not issue the requisite travel documentation for Mr. Ma, or any other Cambodian national. App. F, *infra*, 12a; App. E, *infra*, 10a-11a.[7] Nonetheless, the INS refused to release Mr. Ma. He therefore remained confined in INS custody from June of 1997, until the district court ordered his release in September of 1999, almost a year after the deportation order became final. App. A to Pet. for Cert. 5a.

B. Administrative Custody Reviews.

In April 1999, Mr. Ma requested an administrative custody review by the INS in the presence of counsel. On or about May 6, 1999 (190 days after his deportation order became final), Mr. Ma and counsel met with an INS deportation officer regarding his request for release.

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constitutional rights. See, *infra*, pp. 18-20, 31-32.

[7] To counsel's knowledge, the INS has not been able to deport any national of Cambodia who, like Mr. Ma, has been a long-time resident of the United States, over at least the past decade. See, e.g., App. D to Pet. for Cert. 59a; App. E, *infra*, 9a-11a.

Mr. Ma asserted that he would abide by all conditions of release and cooperate with the INS in securing the requisite travel documents. He also submitted numerous letters of support. App. A to Pet. for Cert. 5a-6a.

By a form letter dated June 2, 1999, INS Deputy District Director George Morones denied Mr. Ma's request for release. "[T]he letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release." App. A to Pet. for Cert. 6a. Nor did the letter indicate any consideration of Mr. Ma's INS detention to date or the potentially indefinite detention faced in light of Cambodia's expressed refusal to issue the requisite travel documents for Mr. Ma's deportation. App. H to Pet. for Cert. 77a-78a. "The letter added that 'there is no appeal from this decision.'" App. A to Pet. for Cert. 6a. The deportation officer's report and recommendation on which Mr. Morones relied in making his June 1999 decision accurately reflects many positive equities in Mr. Ma's case and lists only three factors weighing against his release: past gang affiliation,[8] his single criminal conviction, and Mr. Ma's planned participation in a hunger strike while in INS custody. Id. at 6a-7a; App. H to Pet. for Cert. 79a-85a.[9]

INS Headquarters, in a report dated September 30, 1999, recommended that the INS continue Mr. Ma's detention based solely upon his criminal conviction and participation in a hunger strike. App. A to Pet. for Cert. 7a; App. I to Pet. for Cert. 87a-89a.

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[8] Mr. Ma's "history of gang activities" consists solely of the manslaughter offense for which he was convicted. App. D to Pet. for Cert. 60a n.3.

[9] Although the petition for *certiorari* correctly notes that Mr. Ma was at one time transferred from one INS facility to another, it omits the fact that the transfer occurred as a result of his "planned participation in a hunger strike," his "only 'behavioral problem'" during his more than two years in INS custody. App. D to Pet. for Cert. 60a n.3.

C. District Court Proceedings.

By petition for writ of habeas corpus, Mr. Ma alleged that his ongoing INS detention, where his deportation could not be effectuated in the reasonably foreseeable future, was excessive in violation of his Fifth Amendment right to substantive due process of law.[10] App. G, *infra*, 14a-15a. Alternatively, Mr. Ma alleged that, even if his ongoing detention did not violate his substantive due process rights, the administrative custody review process implemented by the INS (on its face and as applied to Mr. Ma) was devoid of the fundamental components of procedural due process. Id.; App. B to Pet. for Cert. 34a-36a & 35a n.1. Mr. Ma further challenged, via *Amicus* American Civil Liberties Union Foundation, the INS's statutory authority to detain an individual beyond the 90-day removal period where that individual's deportation cannot be effectuated. App. B to Pet. for Cert. 35a.

By Joint Order, the entire district court for the Western District of Washington rejected the Petitioners' contention that the continued detention of individuals subject to a final order of deportation was a constitutional exercise of the Attorney General's power over immigration matters. Id. at 41a-51a. The district court set forth a legal framework to guide the district courts' individual consideration of the many petitions pending in the district in which the individual challenged his ongoing INS detention on substantive due process grounds: "The critical inquiry. . . is whether an alien's detention is excessive in relation to the[] government interest[]" in "ensuring the removal of aliens ordered deported" and the goals incidental to that interest of "preventing flight prior to deportation" and "protecting the public from dangerous felons." Id. at

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[10] Mr. Ma further argued that, even if his deportation was reasonably foreseeable, there was no evidence of present dangerousness or flight risk that would justify his ongoing detention consistent with the mandates of the Fifth Amendment. App. G, *infra*, 14a-15a.

47a. The court held that "[i]n making this determination, [the court] must necessarily balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." Id.[11]

Thereafter, in this case, the district court ordered an evidentiary hearing, in part to determine the extent of the Petitioners' efforts to repatriate Mr. Ma and the likelihood of effectuating his deportation. App. C to Pet. for Cert. 53a-54a. By stipulation, the parties filed supplemental pleadings in lieu of an evidentiary hearing. App. D to Pet. for Cert. 57a-58a. On September 29, 1999, based upon its consideration of all the evidence presented by both parties, the district court concluded that Mr. Ma's deportation was not reasonably foreseeable, and therefore, that Mr. Ma's ongoing detention was excessive in violation of his substantive due process rights. App. D to Pet. for Cert. 60a; see also App. A to Pet. for Cert. 2a & n.2. Alternatively, the district court held his "interest in liberty clearly outweighs the government's present interests in detaining him" because:

> [e]ven if there were a realistic chance of deporting Ma, the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a

[11] The entire district court further found that the procedures governing the detention of individuals subject to a final order of removal -- on their face -- deprived the individuals of their respective rights to procedural due process of law. App. B to Pet. for Cert. 47a-52a (noting reliance on past criminal history and fact that individual is facing removal from United States to summarily conclude that the alien poses a risk of flight or danger to the community does not comport with due process). "At a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation." Id. at 51a. However, neither the district court in this case nor the court of appeals reached Mr. Ma's procedural due process claim in light of its resolution of the petition on an alternative, dispositive ground. App. A to Pet. for Cert. 7a & 11a n.14. Accord American Mfrs. Mutual Ins. Co. v. Sullivan, 426 U.S. 40, 119 S.Ct. 977, 990 (1999) (courts need not reach an alternative claim where it can resolve case on another dispositive issue).

> danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

App. D to Pet. for Cert. at 60a-61a (footnotes omitted). Because the district court's resolution of the substantive due process claim was dispositive of Mr. Ma's petition, the district court did not reach Mr. Ma's claim that his ongoing detention violated his rights to procedural due process of law. Id. at 61a n.5.

Mr. Ma was released on October 25, 1999, following the Petitioners' unsuccessful attempts to secure a stay of his release from the district court or the court of appeals. App. A to Pet. for Cert. 7a & n.9; App. A, *infra*, 2a-3a; App. B, *infra*, 4a-5a. On November 2, 1999, Mr. Ma voluntarily surrendered to INS custody following the Honorable Justice Sandra Day O'Connor's interim stay of the district court's release order, pending her receipt of briefing from Mr. Ma and consideration of the Petitioners' application to the Supreme Court to stay his release. App. D, *infra*, 7a. On November 12, 1999, the entire Supreme Court, by Justice O'Connor's referral, denied the Petitioners' application for a stay of Mr. Ma's release. App. D, *infra*, 8a. Mr. Ma was released and remains today with his family at their home in Kent, Washington.[12]

[12] The petition for *certiorari* notes Mr. Ma's March 30, 2000 arrest on an allegation of misdemeanor assault. Mr. Ma was released on the evening of his arrest on $1,000 bond and his agreement to abide by a no-contact order with the alleged victim. At an arraignment hearing the next afternoon in Kent Municipal Court, after argument, the court rejected the prosecutor's request for an increase in bond to $5,000, and ordered Mr. Ma's continued release on these same conditions. After Mr. Ma timely reported his arrest to the INS, the INS demanded his surrender based solely upon his arrest. Although Mr. Ma agreed to voluntarily surrender if so ordered, Mr. Ma objected to the INS's attempt to summarily revoke the district court order releasing him without any hearing or proof, and without application to the district court to modify its release order under Fed. R. App. P. 23. Following the court of appeals' decision in this case, the INS suspended indefinitely its letter of intent to summarily revoke his release order. App. H, *infra*, 19a. On June 26, 2000, the Kent Municipal Court dismissed the misdemeanor case with

D. Ninth Circuit Court of Appeals Proceedings.

A three-judge panel of the court of appeals unanimously affirmed the district court order granting Mr. Ma's writ of habeas corpus and ordering his release. The circuit court recognized its obligation to first determine whether Congress provided the INS with the statutory authority to detain Mr. Ma indefinitely, as urged by the Petitioners. App. A to Pet. for Cert. 8a. The court held that the Attorney General has the statutory authority to detain an individual for a reasonable time beyond the 90-day removal period "in order to accomplish the statutory purpose -- the removal of the alien," but she does not have the authority to detain that same individual beyond the statutory removal period if his deportation cannot be effectuated in the reasonably foreseeable future. App. A to Pet. for Cert. 25a & 31a.

Because the relevant statute, 8 U.S.C. § 1231(a)(6), "is silent about how long beyond the ninety-day removal detention is authorized" the circuit court reasoned that "any construction of the statute must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be 'indefinitely,' 'for a reasonable time,' or some other temporal measure." App. A to Pet. for Cert. 9a-10a. In reaching this conclusion, the circuit court construed the ambiguous statute consistent with its obligation to avoid a substantial constitutional problem raised by the indefinite detention of a deportable but unremovable person. App. A to Pet. for Cert. 11a-24a. And based upon its consideration of the provision's terms, legislative history and statutory evolution, as well as case law interpreting analogous immigration laws, the circuit court concluded that its construction is not "plainly contrary to the intent of Congress." Id. at 24a-29a; see also id. at 29a-31a (considering international law proscription against

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prejudice, which the City of Kent has appealed.

prolonged and arbitrary detention).

Applying the statutory analysis to the facts of Mr. Ma's case, the court of appeals found that, despite the good faith efforts of the United States to continue negotiations with Cambodia, Mr. Ma's removal to Cambodia is not reasonably foreseeable, and affirmed the district court's order granting the writ and ordering Mr. Ma's release. Id. at 25a, 32a & n.30 ("[B]oth sides agree that the United States has no functioning repatriation agreement with [Cambodia], that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time).").[13]

The Petitioners' request for rehearing en banc was denied on June 2, 2000. App. E to Pet. for Cert. 62a-63a.

SUMMARY OF REASONS FOR DENYING THE WRIT OF *CERTIORARI*

Certiorari review is not warranted for four reasons. First, there is no circuit split which would warrant *certiorari* review. As the Solicitor General recently acknowledged in his

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[13] Contrary to the Petitioners' representations, the existence of a repatriation agreement is not central to the circuit court's legal holding. Pet. for Cert. 16 n.9. The court of appeals decision requires the court to determine whether removal in each individual case is reasonably foreseeable, not whether a repatriation agreement exists. And, as explicitly stated by the court of appeals, "what constitutes a reasonable time will depend on the circumstances of the various cases." App. A to Pet. for Cert. 31a. Here, nothing in the circuit court opinion prevents the INS from detaining persons ordered deported beyond the 90-day removal period if they can, in fact, be removed despite the lack of a repatriation agreement. As the circuit court noted, there are "various reasons" why an alien cannot be removed within the 90-day period. App. A to Pet. for Cert. 8a. The undisputed evidence in this case, however, has always indicated that Mr. Ma could not be removed to Cambodia because a repatriation agreement is necessary before Cambodia will even consider issuing the requisite travel documents for a particular individual, and no such agreement currently exists. Id. In other words, this factor relates solely to the particular facts of Mr. Ma's case, not to the statutory construction of § 1231(a)(6).

opposition to *certiorari* in Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *petition for cert. filed* (U.S. Jan. 11, 2000) (No. 99-7791), the instant case does not squarely conflict with Zadvydas because the Fifth Circuit did not address the statutory analysis decided by the court of appeals in Ma. Nor does any conflict with the Tenth Circuit's divided decision in Ho v. Greene, 204 F.3d 1045 (10th Cir. 1999), warrant a writ of *certiorari*. Because rehearing was denied in Ho on grounds unrelated to the merits of the statutory claim, the Tenth Circuit did not have the opportunity to consider en banc the Ho panel decision. However, the Tenth Circuit is currently considering a petition for immediate en banc review of the Ho decision in Vo v. Greene, 63 F.Supp.2d 1278 (D. Colo. 2000), *appeal pending* No. 99-1491 (10th Cir.). Ho, which contains only a brief statutory discussion, preceded the Ma decision and therefore, did not benefit from Ma's exhaustive statutory analysis. But the Tenth Circuit, if hearing en banc in Vo is granted, will have that opportunity in the near future.

Second, *certiorari* review is premature because the statutory issue, which is currently presented in cases pending before several courts of appeals and district courts across the country, has only recently begun to percolate through the federal courts. Indeed, the INS is in the process of revising its regulations governing post-order detention. Therefore, the INS may remedy any present conflict on its own, without necessitating further guidance from the Supreme Court.

Third, the court of appeals' decision is entirely consistent with the INS's longstanding approach to deportable aliens, and will not cause the unprecedented release of dangerous criminal aliens. Mr. Ma, and others like him, have served their terms of imprisonment for their prior offenses and were ordered released by the criminal justice system long ago. The INS has traditionally released these individuals under orders of supervision and continues to do so today.

And, under Ma, the courts below are not summarily opening INS's doors but continue to reach individualized release decisions based upon the facts of the particular case.

Finally, a writ of *certiorari* is not warranted because the court of appeals' interpretation of § 1231(a)(6) is entirely consistent with principles of statutory construction and Supreme Court precedent. The circuit court's statutory analysis considers the plain language of the provision, the history and structure of the entire statutory scheme of which it is a part, as well as Congressional intent, and follows this Court's traditional constitutional avoidance doctrine; it is plainly correct. Moreover, nothing in the court of appeals' decision usurps or otherwise impermissibly infringes upon the Attorney General's authority in immigration matters. The fact of any ongoing negotiations with Cambodia does not affect the circuit court's statutory analysis or compel a contrary result in this case.

For all of these reasons, each of the Petitioners' arguments made in support of *certiorari* review is without merit; a writ of *certiorari* is entirely premature and unwarranted.

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REASONS FOR DENYING THE WRIT OF *CERTIORARI* [14]

I. THERE IS NO SIGNIFICANT CONFLICT WITH ANY OTHER CIRCUIT COURT OF APPEALS WHICH WARRANTS REVIEW BY THE SUPREME COURT.

A. There Is No Conflict With the Fifth Circuit.

The Petitioners suggest that a conflict exists with the Fifth Circuit decision in Zadvydas, 185 F.3d 279. Pet. for Cert. 24-26. At the same time, the Solicitor General recently stated in his opposition brief to *certiorari* review in Zadvydas that, "the Fifth Circuit did not address the statutory issue decided by the Ninth Circuit in Ma, and the Ninth Circuit in Ma did not reach the constitutional issue decided by the Fifth Circuit in this case. There accordingly is no conflict

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[14] On August 24, 2000, undersigned counsel received The Washington Legal Foundation and Allied Educational Foundation motion for leave to file an *amicus* brief in support of the petition for *certiorari* and corresponding brief. Amicus' motion for leave to file a brief should be denied. Most of the factual and legal contentions are repetitious of those made in the petition for *certiorari* and are, therefore, addressed in the body of this opposition brief. However, the *amicus* brief asserts two points not mentioned in the petition for *certiorari*: (1) statistics indicate, from *amicus'* perspective, that individuals like Mr. Ma are likely to be recidivist. Brief for Amicus at 7-8; and (2) based on 8 U.S.C. § 1226, a provision which the Petitioners have never invoked in this case (presumably because it governs detention before issuance of a final order), the court of appeals lacked jurisdiction to decide the statutory question of whether 8 U.S.C. § 1231(a)(6) authorizes Mr. Ma's indefinite detention. Brief for Amicus at 13-16.

As to the statistics cited, the Los Angeles study tracked recidivism among aliens who were unlawfully present in the United States, not long-time lawful residents like Mr. Ma. And their reliance on these statistics, even assuming *arguendo* they were factually relevant, ignores this Court's admonitions that "purpose to injure" cannot be "imputed generally to all aliens subject to deportation." Carlson v. Landon, 342 U.S. 524, 538 (1952).

As to the jurisdictional argument, 8 U.S.C. § 1226, section 236 of the Immigration and Nationality Act (INA), covers only the detention of aliens before a final order issues and the jurisdiction provision in that section is explicitly limited to decisions "under [§ 1226]." The Petitioners have never relied on § 1226 to authorize Mr. Ma's detention. Accordingly, any jurisdictional provision relating to detention under § 1226 is irrelvant to this case. See App. A to Pet. for Cert. 3a n.3.

between the Fifth Circuit and the Ninth Circuit[.]" Brief for Respondents in Opposition at 16-17, Zadvydas, (U.S. Jan. 11, 2000) (No. 99-7791).

The Solicitor General's conclusion about a lack of conflict is correct. Compare Zadvydas, 185 F.3d at 294-96 (relying on precedents dealing with excludable aliens, found ongoing detention constitutional) with App. A to Pet. for Cert. 22a (the Ma court avoided the constitutional question entirely by resolving the case on statutory grounds); see also United States v. X-Citement Video, Inc., 513 U.S. 64, 86 (Scalia, J., joined by Thomas, J., dissenting) (articulating distinction between interpreting a statute to avoid substantial constitutional question and finding statute unconstitutional).[15] The Zadvydas decision does not, therefore, create a circuit split sufficient to warrant *certiorari* review. See, e.g., Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952); The Arlington, Inc. v. Mayer, 339 U.S. 965 (1950).[16]

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[15] The Fifth Circuit's decision is also distinguishable on the facts. Zadvydas was based upon a lengthy factual analysis of the circumstances of the particular petitioner which led to the court's ultimate conclusion that the alien's deportation was possible. Zadvydas, 185 F.3d at 291-94. It is unclear at this time whether the decision will be interpreted by the Fifth Circuit as limited to the facts and circumstances of that particular case, namely to aliens whose deportation can, in fact, be effectuated. But to the extent any present conflict arises from mere differences in the factual scenarios of the respective cases, *certiorari* is not warranted. See, e.g., United States v. Johnson, 268 U.S. 220, 227 (1925).

[16] The Petitioners also make a cursory reference to the Third Circuit's decision in Ngo v. INS, 192 F.3d 390 (3d Cir. 1999), to further suggest *certiorari* review is warranted. Pet. for Cert. 23 n.14. However, as the Third Circuit expressly recognized, the petitioner in Ngo is an "excludable" alien, i.e., he was never formally admitted to this country, but was merely paroled into the United States, which parole was ultimately revoked. Ngo, 192 F.3d at 392 & n.1. The Third Circuit specifically expressed no opinion to the indefinite detention of long-time residents who, like Mr. Ma, have been ordered deported. Id. at 398; App. A to Pet. for Cert. 14a-22a.

For these same reasons, the Petitioners' reliance on the Seventh Circuit's decision in Carrera-Valdez v. Perryman, 211 F.3d 1046 (7th Cir. 2000), is misplaced. Pet. for Cert. 25 n.15. Carrera-Valdez, like Ngo and Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995), involved the constitutional right of an "excludable" alien to be

B. The Present Conflict with the Tenth Circuit's Divided Decision in Ho v. Greene, 204 F.3d 1045, Is Tenuous at Best and Does Not Warrant *Certiorari* Review at this Time.

The Tenth Circuit is presently in a posture to reconsider its opinion in Ho and thereby readily and effectively resolve any circuit conflict without the need for intervention by this Court. The Tenth Circuit was deprived of the opportunity to consider *en banc* its statutory holding in Ho because the case was dismissed for lack of jurisdiction in light of Mr. Ho's release from custody. 204 F.3d 1045, *pet. reh'g dismissed* (No. 98-1333) (10th Cir. June 2, 2000). Nevertheless, the Tenth Circuit is presently considering a motion for immediate *en banc* review of the analysis in the follow-up case to Ho, Vo v. Greene, 63 F.Supp.2d 1278, *appeal pending*, No. 99-1491 (10th Cir. 2000). In Vo, the district court granted Mr. Vo's writ of habeas corpus. 63 F.Supp.2d at 1284-85. Following the Tenth Circuit's decision in Ho, Mr. Vo immediately moved the Tenth Circuit for direct hearing *en banc*. As of the date of this pleading, Mr. Vo's petition for hearing *en banc* is under consideration by the Tenth Circuit.[17] Thus, the present conflict may be readily resolved (and dissipated) by the Tenth Circuit without intervention of this Court.

Even if the Tenth Circuit denies *en banc* review in Vo, *certiorari* review is not warranted here. As this Court has repeatedly held, the existence of a circuit split between two circuits does not in itself mandate *certiorari* review. See Metheny v. Hamby, 488 U.S. 913 (1988) (White, J., dissenting from denial of *certiorari*) (noting a number of cases in which Supreme Court denied

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free of indefinite detention. Carrera-Valdez, 211 F.3d at 1047-48.

[17] There is one other appeal currently pending in the Tenth Circuit in which the individual ordered removed has asked the court to hold its consideration of the case in abeyance pending the resolution of the petition for hearing *en banc* in Vo. See Pril v. Greene, No. 99-1303 (D. Colo. 1999), *appeal docketed*, No. 99-1303 (10th Cir.).

review despite existing circuit splits); Sokol Bros. Co. v. Commissioner, 340 U.S. 952 (1951) (*certiorari* denied even though circuit split existed regarding proper construction of provision of the Internal Revenue Code).[18]

Furthermore, the Tenth Circuit rendered its decision before the court of appeals issued its opinion in this case, and therefore, could not benefit from the Ma court's exhaustive statutory analysis. Contrast App. A to Pet. for Cert. 8a-31a with Ho, 204 F.3d at 1056. The Ho majority erroneously interpreted the silence in § 1231(a)(6) as to any time limitation for post-final-order detention as an "express" authorization to the Attorney General "to indefinitely detain certain removable aliens." 204 F.3d at 1057. In so doing, the Tenth Circuit failed to appreciate (or even consider) the plain language of the statute, the evolution of post-final-order detention statutes, or prior case law interpreting analogous immigration laws. See App. A to Pet. for Cert. 24a-29a; see also, *infra*, pp. 26-31.

And the Ho panel rested its analysis on two clearly erroneous premises: First, that the indefinite detention of a deportable alien does not implicate a liberty interest, and, second, that a deportable person stands in the same constitutional footing as an excluded alien, i.e., an alien who has been denied entry at the border and is deemed "not to be present on the United States territory."[19] 204 F.3d at 1058-60. Thereby the Tenth Circuit failed to address or even consider

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[18] The Court has previously let stand another circuit split with respect to prolonged detention by the INS. See, e.g., Marquez-Medina v. Meese, 475 U.S. 1022 (1986) (petition for *certiorari* from Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1985) (the split was with Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981)); see also Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995).

[19] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212-14 (1953) ("an alien on the threshold of initial entry stands on a different [constitutional] footing" than one who has

the guiding principle of constitutional avoidance. See Jones v. United States, -- U.S. --, 120 S.Ct. 1904, 1911 (2000) (applying Court's traditional constitutional avoidance doctrine); X-Citement Video, Inc., 513 U.S. at 78 (same); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (same); United States v. Witkovich, 353 U.S. 194, 199 (1954) (same). See App. A to Pet. for Cert. 11a-24a.

First, the Ho majority's assumption that the indefinite detention of unremovable, deportable aliens implicates no protected liberty interest is contrary to well-established Supreme Court precedent concerning the Due Process rights of aliens admitted to the United States. See, e.g., Plyler v. Doe, 457 U.S. 202, 210-12 (1982) ("Whatever his status under the immigration laws, . . . [a]liens. . . have long been recognized as 'persons' guaranteed due process of law"); Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) ("persons within the territory of the United States. . . and. . . even aliens. . . [may not] be deprived of life, liberty, or property without due process of law."); see also Mathews v. Diaz, 426 U.S. 67, 77 (1976); Landon v. Plasencia, 459 U.S. 21, 32 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590, 597-98 (1953); App. A to Pet. for Cert. 18a & n.21.

Second, the Ho panel failed to recognize the long-standing distinction between aliens like Mr. Ma, who have been lawfully admitted to the United States and "excludable" aliens who, although physically present in the United States, are deemed to have been stopped at the border, seeking entry. See, e.g., Chew, 344 U.S. at 596-97 & 596 n.5 (right to remain may change but constitutional status -- which stems from the Constitution itself -- does not); Plasencia, 459 U.S. at 31 (recognizing distinction between constitutional status of alien "seeking initial admission" and "passed through our gates, even illegally.").

a deportable alien, who has gained admission and developed ties in the United States); see also App. A to Pet. for Cert. 13a-22a; Ho, 204 F.3d at 1061 (Brobry, J., dissenting) ("the majority's treatment of Petitioner's constitutional claims is supported only by a tenuous foundation of legal fiction stacked upon legal fiction.").[20]

Mr. Ma is not an alien standing at the border, seeking admission. He is a long-time resident alien of this country, who entered the United States long ago. The Ma court understood the import of this fact and thereby the substantial constitutional question raised by the Petitioners' construction of the ambiguous statute to permit the indefinite detention of an individual like Mr. Ma. See, *infra*, pp. 31-32; App. A to Pet. for Cert. 13a-23a; see also App. B to Pet. for Cert. 41a-42a. Although the Tenth Circuit did not have the benefit of the Ma court's extensive analysis in this regard when it rendered its decision in Ho, it now has the opportunity to reconsider its statutory analysis. Thus, any present conflict with the Tenth Circuit does not warrant *certiorari* review at this time.

II. *CERTIORARI* REVIEW IS PREMATURE BECAUSE THE STATUTORY ISSUE IS PRESENTLY PERCOLATING IN THE CIRCUIT COURTS OF APPEAL AND THE INS IS IN THE MIDST OF IMPLEMENTING REGULATIONS WHICH MAY ULTIMATELY REGULATE POST-FINAL ORDER DETENTION CONSISTENTLY WITH THE COURT OF APPEALS' DECISION IN MA.

In addition to the Tenth Circuit, appeals involving prolonged post-order detention are pending in two courts of appeals. See Cuesta-Martinez v. INS, 97 F.Supp.2d 647 (M.D. Pa 2000) (involving both statutory and constitutional questions raised by ongoing detention of deportable, but unremovable alien), *appeal docketed,* No. 00-1921 (3d Cir. 2000) (briefing

[20] For these same reasons, the Petitioners' reliance on the Fifth Circuit's faulty analysis is misplaced. App. A to Pet. for Cert. 13a-15a, 17a-21a & 20a n.23.

schedule received); Similien v. United States, *appeal docketed*, No. 98-2958 II (11th Cir. 2000); Taylor v. United States, *appeal docketed*, No. 99-12614-BB (11th Cir. 2000). The issue is also being considered by district courts in the Second, Third, Sixth, and Eighth Circuits. App. I, *infra*, 20a. Thus, even assuming any remaining conflict with the Tenth Circuit, granting *certiorari* at this time would be premature. See, e.g., McCray v. New York, 461 U.S. 961, 962-63 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting denial of *certiorari*) (despite apparent importance of underlying issue, *certiorari* denied where issue required "further study" in lower courts "before it is addressed by this Court").

Moreover, in an apparent response to the Ma litigation, the INS has begun the process of revising its regulations governing post-final order detainees; these regulations implement the statutory mandate of 8 U.S.C. § 1231(a)(6), the statute which the Ma court construed. The process is currently in the comment stage. Pet. for Cert. 13 n.5 & 28. And Ma's standard of permitting detention for a reasonable time in order to effectuate deportation has undoubtedly been suggested by some commentators as a touchstone for the new regulations. Thus, as ultimately promulgated, the INS may adopt regulations implementing § 1231(a)(6) in a manner which recognizes in whole, or in part, the Ma court's holding that persons whose deportation orders cannot be effectuated should be released under an appropriate order of supervision.[21] In any event, to the extent the Petitioners' objections to the court of appeals' constitutional avoidance analysis is based upon the existence of a custody review process and any proposed regulations, Pet. for Cert. 26-29, a grant of a writ of *certiorari* while the relevant regulations are in transition

[21] If the proposed regulations as ultimately promulgated and implemented are consistent with Ma, the INS will likely concur in Mr. Ma's release under an order of supervision pending his deportation to Cambodia.

is premature. See Darr v. Burford, 339 U.S. 220, 227 (1950) (Frankfurter, J., dissenting) ("petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see").

In conclusion, the Petitioners' reliance on the present circuit split between the court of appeals in this case and the Tenth Circuit in Ho is misplaced, particularly where, as here, the Tenth Circuit is presently in a posture to reconsider its interpretation of the statutory claim in light of the exhaustive analysis in Ma; no other circuit has had the opportunity to fully consider the statutory issue; and the INS is in the process of revising its regulations governing post-final-order detention. Review by the Supreme Court at this time is not warranted. See, e.g., Darr v. Burford, 339 U.S. at 227 (Frankfurter, J., dissenting); Gilliard v. Mississippi, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of *certiorari*) (*certiorari* denied in case presenting constitutional questions regarding peremptory challenges where federal circuits had not yet "experimented with substantive and procedural solutions to the problem").

III. THE COURT OF APPEALS' CONSTRUCTION OF § 1231(a)(6) DOES NOT RESULT IN THE UNPRECEDENTED RELEASE OF CRIMINAL ALIENS.

Mr. Ma does not contest the fact that this case involves an important issue, namely, whether the court of appeals was correct in sustaining the validity of a federal statute. However, the Petitioners erroneously contend that the importance of this issue warrants *certiorari* review because the Ma decision results in the unprecedented release of individuals like Mr. Ma under an

order of supervision. Pet. for Cert. 15-16. The Petitioners are wrong.[22]

Far from the dire consequence that the Petitioners predict would result from the Ma decision, the Petitioners are still able to supervise Mr. Ma and others who benefit from this decision outside the prison walls and compel their appearances should the United States successfully negotiate the issuance of the requisite travel documents for each individual's deportation.[23] See 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.5. Moreover, the district courts and the Ninth Circuit are considering each habeas corpus case individually, and are not, as implied by the Petitioners, summarily opening the INS's doors. App. J, *infra*, 21a-23a.

As noted by the court of appeals, with respect to concerns regarding flight risk or danger to the community, the Petitioners are not left without recourse should Mr. Ma or any other individual violate the terms of his supervision or commit another offense. App. A to Pet. for Cert. 32a & 33a n.31 (noting Mr. Ma can be detained and incarcerated if he engages in criminal activity and is subject to penalties, including incarceration of up to a year, for any willful violation of the

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[22] The court of appeals' construction of the federal statute at issue is, as demonstrated below, clearly correct and avoids finding the statute unconstitutional. See, *infra*, pp. 26-38. And, as demonstrated above, *certiorari* review is premature. See, *supra*, pp. 15-22. Thus, even if "important," a writ of *certiorari* to consider the question presented in this case is not necessarily warranted. See, e.g., Carpenter v. Gomez, 516 U.S. 981 (1995) (Stevens, J., respecting denial of *certiorari*) ("Despite the importance of the constitutional question presented, I concur in the order denying the petition for writ of *certiorari*"); Battaglia et al. v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948) (refused to review cases sustaining validity of the Portal-to-Portal Act despite importance of question presented).

[23] While undersigned counsel was unable to find official statistics regarding the cost to Petitioners to incarcerate deportable aliens like Mr. Ma, an April 2000 report by the Federal Bureau of Prisons estimates expected costs of incarceration for one person at $1,807.06 per month ($21,684.67 annually), as compared to the cost of release under an order of supervision, which is estimated at $235.52 per month ($2,823.85 annually), per person. Federal Bureau of Prisons, *Memorandum to All Chief Probation Officers* (April 6, 2000) <http://156.119.80.10/courtoperations/fcsd/html/memos/fcsd00025.htm>.

order of supervision, citing to 8 U.S.C. § 1253(b)). And there is simply no evidence or reason to believe that the Petitioners' interests in protecting the community would not be "vindicated by the ordinary criminal processes involving the charge and the conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." See Foucha v. Louisiana, 504 U.S. 71, 82 (1992).

The Petitioners' inference that the Ma decision will lead to the unprecedented release of dangerous aliens is exaggerated in light of the relatively small number of aliens affected, all of whom have already been ordered released by the criminal justice system.[24] Despite this fact, the Petitioners have always contended that they had the authority to detain Mr. Ma based on his single criminal conviction, unsubstantiated speculation of present gang affiliation, and his participation in a hunger strike.[25] The record, however, demonstrates that these assertions are

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[24] By the Petitioners' calculations, there are approximately 400 unremovable individuals ordered deported but presently incarcerated by the INS in the various states included in the Ninth Circuit. Pet. for Cert. 16. These individuals are only a small fraction of the more than 50,000 aliens ordered removed (the bulk of whom were apparently apprehended and prosecuted in the Ninth Circuit), and deported each year. See U.S. Dept. of Justice, Immigration and Naturalization Service, *1997 Statistical Yearbook of the Immigration and Naturalization Service*, 167 (1997).

[25] The Petitioners have "never suggested [Mr. Ma] is a flight risk" and the facts of this case belie any such suggestion. App. D to Pet. for Cert. 60a. For instance, he was released for eight days before the Supreme Court entered an interim order staying his release pending its consideration of the Petitioners application to stay his release. During that time, Mr. Ma reported to the INS, arranged for employment should the INS issue a work permit, and spent time with his family. On the morning Justice O'Connor entered the interim order, Mr. Ma voluntarily surrendered to INS custody. App. A to Pet. for Cert. 7a. Even when arrested for an alleged misdemeanor assault, Mr. Ma was released on bond, timely reported his arrest to the INS as required, and complied with all conditions of release.

nothing more than unjustified assumptions or conclusions.[26] Now, the Petitioners rely upon Mr. Ma's recent arrest for misdemeanor assault to suggest the court of appeals' decision resulted in the release of a dangerous alien. However, the Kent Municipal Court, which has the primary responsibility for protecting the public under these circumstances, ordered Mr. Ma released on bond and more importantly, dismissed the case with prejudice.[27] See, *supra*, p. 10 n.12. His release under an order of supervision is neither unprecedented nor inappropriate.

Further, as the Petitioners suggest, pursuant to the INS's own procedures, the INS is likely to release a large number of these detainees in any case. Pet. for Cert. 26-28. Indeed, prior to 1989, similarly situated individuals were automatically released after six months. And the history of post-final-order detention statutes, *infra*, pp. 28-31, underscores that those statutes have always favored release of persons ordered deported, with detention being the exception.

For all these reasons, the Ma decision does not result in the "unprecedented" release of criminal aliens. The issue does not warrant this Court's further consideration.

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[26] For instance, there is no evidence that Mr. Ma is presently affiliated with a gang, or that he maintained any gang affiliations in his over four years in state and INS custody. To the contrary, as the district court specifically found, Mr. Ma's record contains "abundant information about [Mr. Ma's] relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior, all of which oppose a finding of future dangerousness." App. D to Pet. for Cert. 60a n.3. Further, the only "behavioral" problem in his more than four years of custody was his participation in a hunger strike in 1997. App. A to Pet. for Cert. 7a. And while Mr. Ma has never contested the seriousness of the offense for which he was convicted, as found by the district court, it was not the intentional crime the Petitioners have always portrayed it to be. See, *supra*, p. 4-5 n.3.

[27] As both lower courts recognized, even assuming *arguendo* this arrest presents some indicia of *present* dangerousness, the government does not have the authority to punish Mr. Ma for this offense, U.S. Const. amend. V, nor does it enjoy the power to indefinitely detain a person based solely upon its prediction of future dangerousness. See Kansas v. Hendricks, 521 U.S. at 358.

IV. THE COURT OF APPEALS' INTERPRETATION OF § 1231(a)(6) IS ENTIRELY CONSISTENT WITH PRINCIPLES OF STATUTORY CONSTRUCTION AND SUPREME COURT PRECEDENT.

The principal argument advanced by the Petitioners to support the issuance of a writ of *certiorari* in this case is their contention that the Ma decision is erroneous. Pet. for Cert. 16-22, 26-29. For the reasons explained below, the decision of the court of appeals is plainly correct.

A. The Court of Appeals' Construction of § 1231(a)(6) Is Reasonable; Entirely Consonant with its Terms, Legislative History, and Statutory Evolution; and Appropriately Avoided a Substantial Constitutional Question Raised by Mr. Ma's Ongoing Detention.

The court of appeals did not rewrite an unambiguous statute. Pet. for Cert. 17. Instead, the court of appeals properly construed an *ambiguous* statute consistent with the court's obligation to avoid a substantial constitutional problem raised by the indefinite detention of a deportable but unremovable person. App. A to Pet. for Cert. 9a-22a; DeBartolo Corp., 485 U.S. at 575; accord Witkovich, 353 U.S. at 199 (rejecting government's contention that broad language of statute was unambiguous).

First, there is no merit to the Petitioners' contention that § 1231(a)(6) *expressly* authorizes the Attorney General to detain a deportable person like Mr. Ma without time limitation. The statute provides that certain aliens who cannot be removed by the end of the 90-day removal period "may be detained beyond the removal period[.]" 8 U.S.C. § 1231(a)(6); App. A to Pet. for Cert. 8a-9a. Nothing in this text expressly gives the INS the authority to detain indefinitely aliens who fall within this group of persons and who cannot be removed in the reasonably foreseeable future. App. A to Pet. for Cert. 9a & 25a ("To sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies."). Rather, on its

face, the statute provides for detention beyond the 90-day removal period but is *silent* about how long beyond that period the Attorney General may detain a person ordered deported, particularly where deportation is not reasonably foreseeable. App. A to Pet. for Cert. 9a.

Nor does the statute's lack of an express time limit on the detention of deportable aliens constitute an *implicit* authorization for indefinite detention. Rather, as the court of appeals explained: "We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express language to that effect in the statute." App. A to Pet. for Cert. 24a-26a; see also id. at 24a n.25 (noting that "Congress is familiar with time limitations in the detention and removal context and could easily have authorized detention 'without limitation' or 'indefinitely' if it so desired." (citing 8 U.S.C. §§ 1231(a)(1)(A), (a)(1)(C), (b)(2)(C), (b)(2)(D), (c)(3)(A) and (c)(3)(B), as all "specifying various time periods in detention and removal context.")).

Second, the court of appeals' construction of the statute is reasonable and entirely consonant with its legislative history and statutory evolution. The court of appeals' interpretation of statutory silence as authorizing post-final-order detention for only a reasonable period of time is consistent with a long line of precedent. App. A to Pet. for Cert. 26a-29a (discussing case law interpreting pre-1952 immigration statute as authorizing detention only for a "reasonable period" of time to effectuate removal, noting that these cases support "the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention."). Far from substituting its legislative preference for that of Congress, the court of appeals, by interpreting the statute as authorizing detention beyond the removal period for only a "reasonable time" to

effectuate deportation, simply applied the same principles of statutory construction uniformly adopted by courts that have construed prior immigration detention statutes.

The Petitioners incorrectly argue that the statutory evolution of § 1231(a)(6) expresses a congressional intent to authorize indefinite post-final order detention of unremovable aliens. Pet. for Cert. 19-21. Close consideration of the statutory evolution of immigration law in this area demonstrates that the Petitioners' construction -- which for the first time *assumes* Congress intended to permit the INS to "hold people in detention for the remainder of their lives," App. A to Pet. for Cert. 24a -- is the "significant departure from past law." Pet. for Cert. 17. Accord App. A to Pet. for Cert. 24a-25a n.25 (Congress made no such express statement).

Before 1952, the Immigration Act set no express time limit on the post-final-order detention of deportable aliens. App. K, *infra*, 25a-26a. Then, in 1952, Congress imposed a six-month limitation on the post-final-order detention of deportable aliens. See *former* 8 U.S.C. § 1252(c) (1952) (requiring release under supervision of any deportable alien whose deportation could not be effectuated within six months) (reprinted at App. L, *infra*, 27a).[28] This six-month rule (which prohibited the INS from detaining an individual beyond that point in time) remained in effect for all deportable aliens until 1990, when Congress amended the statute to bar the release of any alien with an aggravated felony conviction, with limited exceptions. See *former* 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991) ("the Attorney General shall not release [alien with aggravated felony

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[28] Federal courts strictly interpreted the six-month time limit contained in the 1952 statute as prohibiting any detention of deportable aliens beyond six months. See, e.g., Oguachuba v. INS, 706 F.2d 93, 96 (2d Cir. 1983); Johns v. Dep't of Justice, 653 F.2d 884, 890 (5th Cir. 1981); Castillo-Gradis v. Turnage, 752 F.Supp. 937, 941 (S.D. Cal. 1990).

conviction] from custody.") (reprinted at App. M, *infra*, 28a-29a).[29]

However, when Congress enacted § 1231(a)(6) in 1996, it repealed the mandatory language in the prior statute, which prohibited the release of deportable aliens with aggravated felony convictions, and replaced it with the permissive language of § 1231(a), which granted the discretionary authority to release these individuals or detain them beyond the 90-day period. Compare 8 U.S.C. § 1231(a)(6) (1996) (alien "may be detained beyond the removal period") with *former* 8 U.S.C. § 1252(a)(2)(B) (1991) ("shall not release"); see also App. A to Pet. for Cert. 24a n.25 (noting that two custody provisions that succeeded the 1995 version of the law, §440(c) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and § 303(b)(3) of IIRIRA, expressly prohibited release but Congress did not use that same language in § 1231(a)(6), which was enacted simultaneously therewith).[30] The language used by Congress in the previous post-order detention statutes is stronger and absolutely prohibits release from detention. Id. By contrast, § 1231(a)(6) is silent about the duration of the Petitioners' authority to detain a deportable alien after entry of a final order. In light of the repeal of the mandatory language of the pre-1996 statute, together with the more permissive language implemented by Congress in the

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[29] By adding this mandatory language in 1990, Congress for the first time provided a statutory basis for the INS to detain a limited group of deportable aliens beyond a six-month period to effectuate removal. See *former* 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991) ("Notwithstanding . . . [the six-month rule] the Attorney General shall not release. . . from custody" an alien convicted of an aggravated felony, unless the alien has been "lawfully admitted for permanent residence" and "the Attorney General determines that the alien is not [a danger or flight risk]."). App. A to Pet. for Cert. 24a & n.25.

[30] Congress also shortened the time period within which the INS must execute deportation from 6 months to 90 days, which is entirely consistent with the prior case law imposing a reasonable time of anywhere from two to four months and the greater time period of 6 months in the previous statute, *former* 8 U.S.C. § 1252(c), considered reasonable so long as deportation was reasonably foreseeable. See, *infra*, p. 30; App. A to Pet. for Cert. 26a-29a.

current version of the statute, it cannot be said that Congress has now manifested a clear intent to authorize the indefinite, and potentially permanent, detention of deportable aliens who cannot be removed. Indeed, nowhere in the legislative history of § 1231(a)(6) is there any discussion or stated approval for the indefinite detention of deportable aliens beyond the 90-day removal period.

Moreover, the court of appeals' interpretation of § 1231(a)(6) as containing a reasonable time limitation is entirely consistent with earlier courts' interpretation of the pre-1952 detention statute which, like § 1231(a)(6), was silent as to the duration permitted for post-order deportation detention. App. K, *infra.*, 26a; App. A to Pet. for Cert. 26a-29a (citing to Wolck v. Weedin, 58 F.2d 928, 931 (9th Cir. 1932) (government given 30 days to implement deportation); Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir. 1931) (petitioner must be released if cannot be deported within 30 days); Caranica v. Nagle, 28 F.2d 955, 957 (9th Cir. 1928) (two-month deadline to effectuate deportation not an abuse of discretion); and United States ex rel Ross v. Wallis, 279 F. 401, 404 (2d Cir. 1922) (imposed "reasonable" time limit of four months)). See also Petition of Brooks, 5 F.2d 238, 239-40 (D. Mass. 1925) (held alien was "entitled to be deported, or to have his freedom"). In light of this past law and the consistent adherence to a reasonable time limit for detention pending removal, the court of appeals therefore reasonably interpreted the statute as providing that the general time period for effectuating deportation is now 90 days (less than the pre-1996 six-month period), but allowing for flexibility for those cases requiring "a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose -- the removal of the alien." App. A to Pet. for Cert. 25a.

The court of appeals' construction of § 1231(a)(6) is also consistent with the overall structure of the provisions that have historically governed the detention of deportable aliens like Mr. Ma: release from detention being traditionally the rule, and detention the exception. App. A to Pet. for Cert. 17a n.20. Immigration law history of deportable aliens contains no mention of prolonged detention. Quite to the contrary, as explained above, from 1952 until 1990, the INS was prohibited from detaining any deportable aliens for more than six months after the entry of a final order. Contrast Barrera-Echavarria v. Rison, 44 F.3d 1441, 1447 (9th Cir.) (en banc), cert. denied, 116 S.Ct. 479 (1995) (detention for excludable aliens the norm, release the exception and "Congress has for at least four decades been aware of instances of long-term detention of excludable aliens by the executive branch.").

Finally, the court of appeals' construction avoided a substantial constitutional question raised by Mr. Ma's ongoing detention. The court of appeals' finding of a significant constitutional problem raised by the Petitioners' construction of the statute is consistent with long-standing Supreme Court precedent recognizing the Due Process rights of deportable aliens. See, e.g., Plyler, 457 U.S. at 210-12 (the Fifth Amendment applies to all persons within the territorial jurisdiction of the United States). In suggesting that the court of appeals' decision somehow conflicts with Supreme Court precedent, the Petitioners erroneously equate Mr. Ma who, following inspection by the INS, lawfully entered this country long ago, with an alien who has been stopped at the border and denied entry. There is no authority for the Petitioners' assumption that Mr. Ma should be treated like an alien at the border seeking entry. App. A to Pet. for Cert. 13a-22a. And, as the court of appeals recognized, that assumption flies in the face of Supreme Court precedent recognizing that deportable aliens have constitutional rights

concomitant with their ties to this country. Id.; see also Plasencia, 459 U.S. at 32 ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Wong Wing, 163 U.S. at 238; Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886).

In its adherence to these well-established principles, the court of appeals correctly recognized the serious constitutional problem presented by Mr. Ma's ongoing detention based on an order of deportation that the INS is unable to execute. And in so doing, the court of appeals properly avoided that substantial constitutional question by interpreting the statute as permitting detention for a reasonable time period to effectuate deportation. App. A to Pet. for Cert. 11a-13a, 23a-24a (citing to, in part, Witkovich, 353 U.S. at 199).

B. The Release of Individuals like Mr. Ma Does Not Impermissibly Intrude on Executive Branch Functions.

The indefinite detention of Mr. Ma, who entered this country long ago as a refugee, does not implicate the sovereignty and foreign policy concerns suggested by the Petitioners. Pet. for Cert. 29. Contrary to the concerns which informed this Court's decision in Carlson v. Landon, 342 U.S. 524, 534-36 (1952), and Mathews v. Diaz, 426 U.S. at 81, the indefinite detention of Mr. Ma does not affect the ability of Congress to classify aliens for admission or deportation. Nor does releasing an already admitted alien have any effect on the Petitioners' ability to continue negotiations with the foreign state for the issuance of requisite travel documents or necessary repatriation agreements. As the Petitioners concede, the government's efforts to engage in negotiations with Cambodia have continued despite the release of Mr. Ma and other former nationals of Cambodia. Pet. for Cert. 17 n.10. There is simply no evidence that Cambodia will

discontinue negotiations if Mr. Ma remains released from INS custody, or that the United States is disadvantaged in those negotiations because of his release.[31]

The Petitioners also erroneously suggest that the application of the facts of Mr. Ma's case to the legal holding implies that the Executive Branch believes its negotiations with Cambodia are "futile." Pet. for Cert. 30. Nothing in the court of appeals' decision supports such a view. App. A to Pet. for Cert. 25a, 32a & n.30. The court of appeals did not second-guess the Petitioners' evidence. Rather, taking that evidence at face value, the court of appeals found that the district court correctly concluded that a repatriation agreement is necessary to deport Mr. Ma to Cambodia, and no such agreement or arrangement currently exists. App. A to Pet. for Cert. 32a & n.30. Even if one did exist, there is no evidence that Mr. Ma's deportation would readily follow. App. D to Pet. for Cert. 58a-59a; App. E, *infra*, 9a-11a; App. F, *infra*, 12a.

C. The Court of Appeals Properly Reviewed Mr. Ma's Statutory Claim Under the Constitutional Avoidance Doctrine and Not, as Suggested by the Petitioners, A More Deferential Standard of Review.

The Petitioners' argument further rests on the erroneous assumption that the Attorney General's interpretation of § 1231(a)(6) is entitled to substantial deference under Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984), Pet. for Cert. 18 (citing to INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)), as well as under the plenary power doctrine. Pet. for Cert. 29-30.

First, Aguirre-Aguirre did not involve a constitutional question, but instead dealt with the INS's interpretation of the specific statutory term "serious political crime" (8 U.S.C.

[31] As noted by the Petitioners, Congress has provided a way to deal with recalcitrant countries unrelated to the detention or release of the deported individual. Pet. for Cert. 17 n.13 (Congress authorized the Executive to discontinue issuance of visas as a way to pressure recalcitrant countries to negotiate return of aliens ordered deported).

§1253(h)(2)(C)) in deciding whether an applicant was eligible for political asylum. 526 U.S. at 425. This is the type of technical application of a statutory scheme to which Chevron deference applies. Id. In contrast, the Petitioners' construction of § 1231(a)(6) -- which would permit the indefinite detention of a long-time permanent resident even though his deportation order cannot be effectuated -- poses serious questions regarding the validity of that same provision under the Fifth Amendment. Under these circumstances, as this Court concluded in DeBartolo Corp., 485 U.S. 568, the canon of constitutional avoidance is applicable; Chevron principles of deference are not. 485 U.S. at 575; see also Rust v. Sullivan, 500 U.S. 173, 190-91 (1991), App. A to Pet. for Cert. 9a-10a n.13.

Second, Mr. Ma's claim is not insulated from judicial scrutiny simply because it involves immigration. The Petitioners' suggestion that the court of appeals' analysis is inconsistent with the Attorney General's "plenary power" in immigration matters fails to recognize that the doctrine of constitutional avoidance applies with equal force in immigration cases, as it would in any other matter. See, e.g., Witkovich, 353 U.S. at 199.

Moreover, deference under the plenary power doctrine does not apply in all immigration contexts but is limited to substantive immigration decisions or matters of immigration policy where the political branch is operating within constitutional limits, e.g., which classes of aliens are admissible or deportable. See, e.g., Fiallo v. Bell, 430 U.S. 787, 794-95 (1977) (upheld a section of INA of 1952 which set forth circumstances under which an alien child could immigrate to the United States); and Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (upheld Attorney General's discretion to deny a waiver to allow an entry visa to a Marxist professor from Belgium who had violated the restrictions on his visa during an earlier visit). In contrast, the doctrine has

considerably less force in other contexts. See, e.g., INS v. Chadha, 462 U.S. 919, 940-41 (1983) (refused to apply deferential standard in considering validity of statutory scheme that violated the bicameral requirement and presentment clauses of Article I of the Constitution); Hampton v. Mow Sun Wong, 426 U.S. 88, 99-101 (1976) (same in considering the validity of federal regulation promulgated by Civil Service Commission that excluded aliens from most federal government employment); Wong Wing, 163 U.S. at 237 (same in considering validity of punishment of hard labor post-deportation).

Here, Mr. Ma does not challenge the Attorney General's determination that he should be deported or, in other words, Congress' power to determine who is entitled to enter or remain in the United States. The only issue is whether one of the *means* by which Congress has chosen to implement its immigration power -- detention pending removal -- is statutorily authorized and comports with due process. The *means* by which Congress chooses to implement substantive immigration decisions are subject to constitutional restraints; Congress may not exercise its power in a way which violates the Constitution. See Chadha, 462 U.S. at 940-41 ("The plenary authority of Congress over aliens. . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); see also Fiallo, 430 U.S. at 792-93 n.4 ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of the government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process[.]").[32]

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[32] For these reasons, the Petitioners' reliance on Carlson v. Landon, 342 U.S. 524 (1952), is misplaced as that decision dealt with the validity of detention without bond of an alleged Communist *pending deportation proceedings*. 342 U.S. at 526-28; see also United States v. Witkovich, 353 U.S. 194, 201 (1957) (Carlson did not involve the issue of whether an alien can be detained after entry of removal order that cannot be executed). Similarly, their reliance on Mathews v. Diaz, 426 U.S. 67 (1976), and Harisiades v. Shaughnessy, 342 U.S. 580 (1952), is misplaced as each of these cases involved either the power to deport or expel aliens, or the terms of their residency. Mathews v. Diaz, 426 U.S. at 69-70 (whether petitioner entitled to federal medical benefits which were conditioned on length of residency); Harisiades v. Shaughnessy, 342 U.S. at 581 (whether resident alien may be ordered deported because of membership in Communist party). And in Aguirre-Aguirre, 526 U.S. 415 (1999), the Court dealt with the unrelated issue of immigration classifications and its effects. 526 U.S. at 418.

Consistent with these well-established principles, the court of appeals concluded that, whatever application plenary power deference may have had in other cases, "the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraint." App. A to Pet. for Cert. 21a n.24. The circuit court, accordingly, construed the statute in a manner consistent with ordinary tenets of statutory construction and the well-established doctrine of constitutional avoidance.

D. The Fact of Any Ongoing Negotiations with Cambodia Does Not Warrant a Writ of *Certiorari*.[33]

The Petitioners' submission of the latest information regarding the government's ongoing

[33] The Petitioners rely upon a purported "joint statement" which has been previously filed in related habeas corpus cases as an exhibit to the most recent State Department declaration dated May 5, 2000, and executed by James Hergen, Legal Adviser for East Asian affairs, to support its request for *certiorari* review and contention that the court of appeals decision is wrong. Pet. for Cert. 16 n.9 & 17 n.10. The complete Hergen Declaration and attached exhibits are lodged in its entirety as an exhibit to Mr. Ma's Response to the Petitioners' Lodged Document filed simultaneously herewith.

Mr. Ma does not waive any evidentiary objections that may be made with respect to the receipt of the purported "joint statement," nor has the government supplied the Court or the parties with any information necessary to determine whether judicial notice is appropriate. See Fed. R. Evid. 201. Moreover, Mr. Ma objects to the Petitioners' belated attempt to expand the scope of the record without permission of the Court, and without first seeking leave of the district court to modify its release order of Mr. Ma based upon this purportedly new evidence. S. Ct. Rule 26 (limiting content of Appendix to the record); Fed. R. App. P. 10 (defining the record on appeal).

negotiations with Cambodia does not affect the court of appeals' legal holding that the statute does not authorize detention when deportation is not reasonably foreseeable. It relates solely to the court of appeals' conclusion regarding the application of that holding to Mr. Ma's case -- specifically, to whether Mr. Ma's removal to Cambodia is reasonably foreseeable. Thus, even if this Court concludes that the government's "new" information might affect the application of the court of appeals' holding to the facts of Mr. Ma's case (which it does not, see, *infra*, p. 39 n.34), that finding is insufficient to warrant a writ for *certiorari*. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant *certiorari* to review evidence and discuss specific facts.") (cited with approval in Texas v. Mead, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting denial of *certiorari*); see also Russell v. Southard, 53 U.S. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record."); accord Fed. Rule App. P. 23 (defining proper means to seek modification of release order).[34]

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[34] Even if the Supreme Court considers this new information properly before the Court and relevant to its consideration of the Petitioners' petition for *certiorari*, this information does not compel a result contrary to that reached by the court of appeals: Mr. Ma's deportation is not reasonably foreseeable.

Today, as it was before the district court and the court of appeals, there is no *functioning* informal or formal agreement pursuant to which Mr. Ma will be deported. And a close consideration of Mr. Hergen's declaration demonstrates (as the evidence before the district court and the court of appeals also demonstrated) that the government is still unable to predict with any certainty when, if ever, "a repatriation agreement [or arrangement] will be established and begin to function." App. A to Pet. for Cert. 32a & n.30. See, e.g., Ex. A to Response to Lodged Document (May 5, 2000, Hergen Declaration) at 3 ¶¶ 11-12, 14-16) (continuing negotiations do "not, to be sure, mean that such arrangements are imminent, or that they will result in the immediate repatriation of all nationals of all the states [Cambodia, Laos, and Vietnam] who are currently detained in the U.S. under final order of deportation, exclusion, or removal."). Moreover, there is no evidence that, even assuming *arguendo* an agreement was reached, that Mr. Ma's removal will readily follow.

The court of appeals correctly held that Mr. Ma's deportation is not reasonably foreseeable, and that, therefore, his detention is not statutorily authorized. The circuit court reached this conclusion based upon its consideration of this Court's prior decisions, and well-established rules of statutory construction. The Petitioners' disagreement with the court of appeals' interpretation of § 1231(a)(6) does not warrant further consideration.

CONCLUSION

For these reasons, review of the question presented is not appropriate and the Petitioners' petition for *certiorari* should be denied.

Respectfully submitted,

Jennifer E. Wellman
Staff Attorney

Jay W. Stansell
Assistant Federal Public Defender
Counsel of Record

Thomas W. Hillier, II
Federal Public Defender for the
Western District of Washington

Counsel for Respondent, Kim Ho Ma

August 31, 2000

No. 00-38

In The Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONERS

v.

KIM HO MA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

THOMAS W. HILLIER, II
Federal Public Defender
for the Western District of Washington

JAY W. STANSELL
Assistant Federal Public Defender
Counsel of Record

JENNIFER E. WELLMAN
Staff Attorney

1111 Third Avenue, Suite 1100
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Counsel for Respondent

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA, Plaintiff, v. JANET RENO, Attorney General; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, and RICHARD SMITH, District Director, Seattle District, Defendants.	)	Case No. 99-151L STAY ORDER

The Court's order granting petitioner the writ of habeas corpus, entered in this matter today, is hereby STAYED pending further order of the Court.

The Clerk of the Court is directed to send copies of this order to all counsel of record and to the Assistant District Director for Deportation for the Immigration and Naturalization Service (815 Airport Way South, Seattle, Washington, 98134, facsimile (206) 553-2387).

DATED this 29th day of September, 1999.

/s/ Robert S. Lasnik
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA,	)	Case No. 99-151L
	)	
Plaintiff,	)	ORDER
	)	
v.	)	
	)	
JANET RENO, Attorney General; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, and RICHARD SMITH, District Director, Seattle District,	)	
	)	
Defendants.	)	

The Court entered an order granting petitioner the writ of habeas corpus, and the government requested a stay pending appeal. Having considered petitioner's response and the government's reply, the Court finds a stay is not warranted. The government may have up to seven days within which to request a stay from the Court of Appeals before this Court's order must be executed.

Federal Rule of Appellate Procedure 23(c) requires release of a prisoner who has obtained the writ of habeas corpus unless a court specifically directs otherwise. This establishes a presumption in favor of release. Hilton v. Braunskill, 481 U.S. 770, 777 (1987). When the government seeks a stay, the court should consider the factors ordinarily applied in a civil case. Id. Those include:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

> irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776. After consideration of these factors, the Court determines that the government has not met its burden to justify granting the stay pending appeal.

Because there have been two decisions by circuit courts that support the government's position on appeal in this matter, the Court will allow the government up to seven days to obtain a stay from the Court of Appeals. When that Court decides the government's application for a stay, or on October 7, 1999, whichever is sooner, petitioner must be released, unless the Court of Appeals orders otherwise.

The Clerk of the Court is directed to send copies of this order to all counsel of record and to the Assistant District Director for Deportation for the Immigration and Naturalization Service (815 Airport Way South, Seattle, Washington, 98134, facsimile (206) 553-2387).

DATED this 30th day of September, 1999.

/s/ Robert S. Lasnik
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA,	)	No. 99-35976
	)	
Petitioner-Appellee,	)	DC# CV-99-151-RSL
	)	Western Washington
v.	)	(Seattle)
	)	
IMMIGRATION AND	)	ORDER
NATURALIZATION SERVICE,	)	
et al.,	)	
	)	
Respondents-Appellants.	)	

Before: WALLACE, Circuit Judge

The court, on its own motion, stays the district court's order releasing petitioner, Kim Ho Ma, pending full consideration of the emergency motion for stay pending appeal filed on October 6, 1999.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA,	)	No. 99-35976
	)	
Petitioner-Appellee,	)	DC# CV-99-151-RSL
	)	Western Washington
v.	)	(Seattle)
	)	
IMMIGRATION AND	)	ORDER
NATURALIZATION SERVICE,	)	
et al.,	)	
	)	
Respondents-Appellants.	)	

Before: WALLACE and LEAVY, Circuit Judges

Appellants emergency motion for a stay pending appeal is denied. Petitioner shall be released subject to appropriate conditions before 5:00 p.m. on Monday, October 25, 1999.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA, Petitioner-Appellee, v. IMMIGRATION AND NATURALIZATION SERVICE, et al., Respondents-Appellants.	)	No. 99-35976 DC# CV-99-151-RSL Western Washington (Seattle) ORDER

Before: BROWNING and WALLACE, Circuit Judges

Respondent's emergency motion to stay petitioner's release pending the filing and consideration of an emergency motion for a stay in the United States Supreme Court is denied.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 99A359

JANET RENO, ATTORNEY GENERAL, ET AL.,

Applicants,

v.

KIM HO MA

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the enforcement of the order of the United States District Court for the Western District of Washington, case No. C99-151L, filed September 29, 1999, is hereby stayed pending receipt of a response, due on or before November 9, 1999, and further order of the undersigned or of the Court.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court
of the United States

Dated this 2nd day of November, 1999

120 S.Ct. 466 (Mem)
145 L.Ed.2d 379, 68 USLW 3351
(Cite as: 120 S.Ct. 466)

Supreme Court of the United States

Janet RENO, Attorney General, et al.,
applicants,

v.

KIM HO MA.

No. 99A359.

Nov. 12, 1999.

Application for stay presented Justice O'CONNOR and by her referred to the Court

denied.

NOVEMBER 12, 1999 ORDER

APPENDIX E

JUDGE ROBERT S. LASNIK
MAGISTRATE JUDGE JOHN L. WEINBERG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA, Petitioner, v. JANET RENO; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; and RICHARD SMITH, Respondents.	NO. C 99-151L AFFIDAVIT OF NUALA NI MHUIRCHEARTAIGH

STATE OF WASHINGTON)
:ss
COUNTY OF KING)

I, Nuala Ni Mhuircheartaigh, being duly sworn and upon my oath, depose and say:

1. I am currently engaged as the Thomas Addis Emmett International Fellow at the Federal Public Defender's Office in Seattle, WA, where I am assisting Jay Stansell, Assistant Federal Public Defender, and Jennifer Wellman, Staff Attorney, in their representation of Mr Kim Ho Ma. The statements in this declaration are based on my direct knowledge and a series of telephone conversations with the Consulate General of Cambodia in Washington, D.C.

2. On Wednesday, July 21, 1999, I engaged in a telephone conversation with the Cambodian

Consul Mr. Nou Hak at the Consulate General of Cambodia in Washington, DC. The purpose of this conversation was to ascertain whether any possibility existed of Cambodia issuing travel documentation for Mr. Ma and allowing his deportation to that State.

3. To this end I informed Mr. Hak of the relevant aspects of Mr. Ma's history as revealed by his INS A-file, including but not limited to, the nationality of his parents, his place and date of birth, his criminal conviction while a Permanent Resident of the United States, and the Final Order of Deportation to which he is now subject.

4. Mr. Hak informed me that no possibility existed of issuance of travel documentation to Mr. Ma or any other Cambodian national, because at present, there is no formal deportation agreement between the United States and Cambodia. The Cambodian government has only one international deportation agreement, with Thailand, and as a result, all requests from all other countries for travel documents for Cambodian nationals who have been ordered deported, are refused. Mr. Hak confirmed in this regard, that he was not aware of any successful deportation to Cambodia from the United States.

5. On Thursday, September 9, 1999, I engaged in a follow-up conversation with Mr. Hak concerning the specific case of Mr. Kim Ho Ma. Mr. Hak again confirmed that at present no agreement is in place between the governments of Cambodia and the United States, and that as a result, the deportation of Mr. Ma to Cambodia is at present not possible. Mr. Ma must be processed under United States law, he stated.

6. Mr. Hak also informed me that on Saturday, September 4, 1999, officials of the United States State Department met with officials of the Cambodian Consulate with regard to the State

Department's preliminary proposals for a deportation agreement between the two states. Mr. Hak confirmed, however, that the Cambodian Government and Consulate made no input with regard to the proposal in question. Officials of the Consulate, he stated, will now send a report of the meeting and State Department proposals to the Cambodian Government for comment. Mr. Hak stated, however, that he cannot foretell how much time will pass before the Cambodian Government will pass preliminary comment on the United States State Department proposals. He further stated that he cannot foresee when any possible agreement will be concluded, if indeed such an agreement is ever reached. No definite time can be stated, he emphasized, when a deportation agreement between the United States and Cambodia may be completed.

7. The situation thus remains as heretofore, Mr. Hak repeated: at present, no possibility of authorization of removal of Mr. Ma from the United States to Cambodia exists, and further, he cannot predict when, if ever, such authorization will be forthcoming.

The foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 9th day of September, 1999.

/s/ Nuala Ni Mhuircheartaigh

[seal] SUBSCRIBED and SWORN to before me this 9th day of September, 1999.
/s/ Karen A. Crawford
NOTARY PUBLIC in and for the State of Washington, residing at Issaquah
My appointment expires 7/19/02

APPENDIX F

[seal]
NATION - RELIGION - KING

KINGDOM OF CAMBODIA
Royal Embassy of Cambodia
to the United States of America
Washington, D.C.

July 27, 1999

Mr. Jay W. Stansell
Assistant Federal Public Defender
Western District of Washington

Dear Mr. Stansell,

I have the honor to acknowledge receipt of your letter date July 26, 1999, regarding the Travel Document of former Cambodia citizen to deport from United States to Cambodia. I would like to inform you that the Royal Government of Cambodia has no extradition treaty with the United States. Therefore, subject must be detained under the laws of the United States.

Please accept the assurances of my high consideration.

Sincerely,

/s/
Nou Hak
First Secretary and Consul

4500 16th Street, N.W. Washington, D.C. 20011 Tel: (202) 726-7742 Fax: (202) 726-8381
Web Page: http://www.embassy.org.cambodia
Email: cambodia@embassy.org

APPENDIX G

JUDGE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA, Plaintiff, v. IMMIGRATION AND NATURALIZATION SERVICE, Defendant.	NO. C 99-0151WD AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2241

1. Name and location of place of confinement:[1]

King County Correctional Facility, Regional Justice Center Kent, 620 West James Street, Kent, Washington 98032, pursuant to a contractual arrangement with petitioner's custodian, the INS District Director at Seattle, Washington.

2. Name and location of court causing confinement:

INS District Director, Seattle, Washington.

3. Case Name and Number: A 27 365 395

4. Date of judgment of conviction:
Placed in INS detention on June 6, 1997; petitioner was ordered deported in September of 1997; petitioner appealed his deportation order to the BIA, which denied his appeal in October of

[1] This petition substantially conforms to the Model Forms for petitions under 28 U.S.C. § 2241.

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1998.

5. Sentencing Date: N/A

6. Sentence: N/A

7. Sentencing Judge: N/A

8. Nature of offense or offenses for which you were convicted: N/A

9. What was your plea: N/A

10. Kind of trial: N/A

11. Did you testify at trial? N/A

12. Did you appeal from the judgment of conviction or sentence? No.

13. If you did appeal, list the court to which you appealed:

(a) Name of Court:

(b) Result:

(c) Date of Result:

14. Did you seek any further review? N/A

15. List the court(s) to which you sought further review?

(a) Name of Court:

(b) Nature of Review:

(c) Result:

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to your confinement in any court, state or federal?

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Subsequent to this petition, petitioner filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. §2241 (Case No. C99-0337C, U.S. Dist. Ct., W.D. Wa.)

17. GROUNDS FOR RELIEF:

A. Petitioner's indefinite detention by respondent INS is in violation of his rights to procedural and substantive due process, as guaranteed by the Fifth Amendment to the United States Constitution.

B. Because petitioner is seeking relief related only to his custody status, which is not inconsistent with an order of deportation, exhaustion of administrative remedies, if any, is not required.

C. Petitioner's detention is unconstitutional, because he is not a flight risk, and he does not present a danger to society.

17a. Facts in support of grounds for relief as set forth in §17:

A. Petitioner is subject to an order of deportation, not incarceration, however he is being deprived of personal liberty indefinitely because Cambodia, his native country, refuses to accept his return.

B. Petitioner has asked the Immigration Judge for release to community supervision, and has been denied bail three times. Petitioner went on a hunger strike to bring attention to his unlawful detention, but the INS did nothing.

Petitioner should not be required to exhaust administrative remedies (if any such remedies are actually available) relating to the underlying order for deportation in order to be released from his indefinite incarceration, which violates his constitutional rights.

C. Petitioner has many family members who would support him if he were released. He has a good job waiting for him and a place to live in a safe environment. Petitioner would make a positive contribution to society if he were released.

Although the INS is holding petitioner because it believes he is a danger to the community or a flight risk, or both, it is not giving him any access to educational, rehabilitative or vocational programs. Petitioner is therefore not being given any chance to prove his rehabilitation.

D. Petitioner filed the instant *pro se* petition on February 2, 1999. The Federal Public

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Defender's Office was appointed to represent Petitioner on April 22, 1999. As of today's date, counsel for Petitioner has not received the Administrative File (A-file) from Respondent.

Petitioner's claim that he is being detained unconstitutionally is the same claim raised by over fifty other petitioners presently seeking relief in this district. By Order of the District Court for the Western District of Washington, Petitioner's case will be heard before a "panel" of all five district court judges along with four other "lead" cases. Counsel for Petitioner intends to perform a comprehensive review of the Petitioner's A-file, as well as independently investigate the individual circumstances of Petitioner's claims, which Petitioner anticipates will disclose additional facts supporting the above-stated claims.

The Petitioner reserves the right to assert additional facts once Respondent provides counsel with his INS administrative file, and in rebuttal to facts alleged by the INS in its brief in this proceeding.

18. Do you have any petition or appeal now pending in any court or administrative body as to the claims raised above? No.

19. Have you exhausted your administrative remedies with respect to the claims raised above?

See 17(D), above.

20. State the administrative remedies that you pursued?

(a) Nature of Review:

(b) Result:

21. Give the name and addresses, if known, of each attorney who represented you in the following stages of the underlying judgment:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At change of plea: N/A

(d) At trial: N/A

(e) At sentencing: N/A

(f) On appeal: N/A

(g) In any post-conviction proceedings: N/A

(h) On appeal from any adverse ruling in post conviction proceedings: N/A

(i) Other:

(j) Other:

22. Do you have any future sentence to serve after you complete the sentence imposed by the underlying judgment in your case? No.

23. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information? Yes.

PRAYER FOR RELIEF

Based upon the illegal and unconstitutional actions listed above, Petitioner requests that the Court grant his petition and direct respondent to release him from custody, as well as any other relief to which he may be entitled in this proceeding under 28 U.S.C. § 2241.

On information and belief, the foregoing information is true and correct.

Dated: April 23, 1999.

Respectfully submitted,

/s/

Jay Stansell
Assistant Federal Public Defender
Attorney for Petitioner Kim Ho Ma
Federal Public Defender
1111 Third Avenue, Suite 1100
Seattle, WA 98101
(206) 553-1100

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of April, 1999, I caused to have hand delivered the foregoing Amended Petition to:

Mr. Christopher Pickrell
Assistant United States Attorney
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104

/s/ Theresa Simpson

APPENDIX H

U.S. Department of Justice
Immigration and Naturalization Service
Western Region, Seattle District

Office of the District Director

815 Airport Way South
Seattle, WA 98134
206-553-0936
April 13, 2000

Kim Ho MA, A27 365 395
20702 113th Place SE
Kent, WA 98031

Dear Sir:

In a letter dated April 4, 2000 I notified you that I was revoking your release under an Order of Supervision because I believe that you represent a threat to the public safety.

This letter is a notice to you that because of the recent decision by the 9th Circuit Court of Appeals in your favor in your *habeas corpus* case I am suspending that order to surrender. You need not appear to return to custody on April 19th as previously arranged through your attorney.

The order is not cancelled; it is only suspended pending further legal consideration of your case by the government. The fact that I suspend the order carries no implications regarding my continued belief that you are a threat to the public safety, as explained in the notice of April 4. The suspension also has no impact on the Order of Deportation entered against you on September 12, 1997, and affirmed by the Board of Immigration appeals on October 26, 1998.

You must continue to report under the Order of Supervision on the tenth of each month, or the next business day if the 10th falls on a weekend or holiday. You and your attorney will be notified of any further action, or requirements that may arise.
FOR THE DISTRICT DIRECTOR

/s/
George L. Morones
Assistant District Director for
Detention and Deportation
Seattle, Washington

[X] cc: Attorney of Record or Representative Federal Public Defender, Seattle

APPENDIX I

List of Pending Circuit Court and District Court Cases Known to Respondent's Undersigned Counsel

Third Circuit Court of Appeals

Cuesta-Martinez v. INS, No. 00-1921

Eleventh Circuit Court of Appeals

Prieto v. United States, No. 99-10545-B
Taylor v. United States, No. 99-12614-BB

District Courts

Armendariz-Montoya v. Sonchik, No. CV-00-0422-PHX-RGS (LOA) (D. Arizona)
Blanco Penalver v. McElroy, No. 98 Civ. 285 (MGC) (S.D.N.Y)
Leybinsky v. McElroy, No. 00-CV 4474 (LAP) (S.D.N.Y.)
Yngelmo v. Reno, No. 00-1035 (D.N.J.)
Del Risco v. Hansen, No. C-3-99-508 (S.D. Ohio)
Nguyen v. INS, No. 4-00-CV-90012 (S.D. Iowa)

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APPENDIX J

DISTRICT COURT-ORDERED RELEASES IN WESTERN DISTRICT OF WASHINGTON

Since the district court order in Phan v. Reno, 56 F.Supp.2d 1149 (W.D. Wash. 1999), but before the Ninth Circuit decision in Ma, 36 individuals have been ordered released by the district court for the Western District of Washington. And only 29 orders have been entered following the Ninth Circuit's decision in Ma.

DISTRICT COURT DECISIONS POST PHAN V. RENO: 36

Hanan Abdol v. Reno, C99-1056 (W.D. Wash. Dec. 10, 1999) (Vietnam),
appeal voluntarily dismissed, No. 00-35140 (9th Cir. May 18, 2000)
Columbus Agada v. Reno, C99-379L (W.D. Wash. Jan. 5, 2000) (Cameroon),
notice of appeal filed, No. 00-35257 (9th Cir. Mar. 22, 2000)
Raad Mfleh Almosawi v. Reno, C99-575C (W.D. Wash. Dec. 16, 1999) (Iraq),
notice of appeal filed, No. 00-35160 (9th Cir. Feb. 10, 2000)
Dennis Vladimirovich Batyuchenko v. Reno, C99-185R (W.D. Wash. Sept. 10, 1999) (Belarus),
notice of appeal filed, No. 99-36104 (9th Cir. Nov. 16, 1999)
Pey Bin v. Reno, C99-719C (W.D. Wash. Dec. 7, 1999) (Cambodia),
affirmed, No. 00-35171 (9th Cir. Aug. 11, 2000)
Phuoc Ngoc Bui v. Reno, C99-387P (W.D. Wash. Feb. 7, 2000) (Vietnam),
notice of appeal filed, No. 00-35300 (9th Cir. Mar. 31, 2000)
Panharith Chan v. Reno, C99-1091R (W.D. Wash. Dec. 7, 1999) (Cambodia),
no appeal timely filed
Mokthar Chebil v. Reno, C99-666Z (W.D. Wash. Jan. 27, 2000) (Algeria),
notice of appeal filed, No. 00-35270 (9th Cir. Mar. 16, 2000)
Bounthavy Choulamountry v. Reno, C99-281R (W.D. Wash. Nov. 11, 1999)(Laos),
affirmed, No. 99-36241 (9th Cir. Aug. 11, 2000)
Thong Vi Duong v. Reno, C99-930R (W.D. Wash. Jan. 28, 2000) (Vietnam),
notice of appeal filed, No. 00-35285 (9th Cir. Mar. 24, 2000)
Son Thai Huynh v. Reno, 56 F. Supp.2d 1160 (W.D. Wash. July 9, 1999) (Vietnam),
appeal voluntarily dismissed, No. 99-35703 (9th Cir. Dec. 22, 1999)
Vinh Ngoc Huynh v. Reno, C98-289R (W.D. Wash. Nov. 22, 1999) (Vietnam),
affirmed, No. 00-35090 (9th Cir. Aug. 14, 2000)
Phunyouphone Kanyavong v. INS, C99-1293 (W.D. Wash. March 1, 2000) (Laos),
affirmed, No. 00-35344 (9th Cir. June 28, 2000.)
Your Khorn v. Reno, C99-1455C (W.D. Wash. Feb. 10, 2000) (Cambodia),
affirmed, No. 00-35345 (9th Cir. June 28, 2000)

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Chanh Kotaveth v. INS, C99-529R (W.D. Wash. Dec. 3, 1999) (Laos),
notice of appeal filed, No. 00-35006 (9th Cir. Dec. 22, 1999)
Varant Krikorian v. INS, C99-1142C (W.D. Wash. Jan. 21, 2000) (Iraq/Turkey),
affirmed, No. 00-35262 (9th Cir. Aug. 15, 2000)
Piotr Lepesh v. INS, C99-35R (W.D. Wash. Nov. 23, 1999) (Kazakhstan),
notice of appeal filed, No. 00-35083 (9th Cir. Jan. 19, 2000)
Daren Lim v. Reno, C99-528Z (W.D. Wash. Dec. 9, 1999) (Cambodia),
affirmed, No. 99-36191 (9th Cir. Aug. 14, 2000)
Kim Ho Ma v. Reno, C99-151L (W.D. Wash. Sept. 29, 1999)(Cambodia),
affirmed, 208 F.3d 815 (9th Cir. Apr. 10, 2000).
Boudsakhone Nanthad[illegible]v. Reno, C99-576L (W.D. Wash. Oct. 26, 1999) (Laos),
notice of appeal filed, No. 00-35003 (9th Cir. Dec. 27, 1999)
Trung Quoc Ngu v. Reno, C99-609C (W.D. Wash. Feb. 3, 2000) (Vietnam),
notice of appeal filed, No. 00-35256 (9th Cir. Mar. 17, 2000)
Nam Nguyen v. Reno, C99-813L (W.D. Wash. Feb. 1, 2000)(Vietnam),
affirmed, No. 00-35291 (9th Cir. Aug. 14, 2000)
Nghia Phu Nguyen v. Smith, C99-637Z (W.D. Wash. Nov. 24, 1999) (Vietnam),
notice of appeal filed, No. 00-35084 (9th Cir. Jan. 19, 2000)
Vu Tien Pham-Nguyen v. Reno, C99-1105 R (W.D. Wash. Dec. 10, 1999) (Vietnam),
appeal voluntarily dismissed, No. 00-35141 (9th Cir.)
Vichai Saly v. Reno, C99-671R (W.D. Wash. Nov. 8, 1999) (Cambodia/Thailand),
affirmed, No. 00-35058 (9th Cir. Aug. 15, 2000)
Ros Samnang v. Reno, C99-579C (W.D. Wash. Nov. 29, 1999) (Cambodia),
notice of appeal filed, No. 00-35179 (9th Cir. Feb. 11, 2000)
Amanuel Samuel v. Reno, C99-968L (W.D. Dec. 17, 1999) (Eritrea),
no appeal timely filed
Seffatollah Sarmadi v. Reno, C99-388Z (W.D. Dec. 23, 1999) (Iran),
notice of appeal filed, No. 00-35189 (9th Cir. Feb. 16, 2000)
Khamsaene Sivongxay v. Reno, 56 F.Supp.2d 1167 (W.D. Wash. July 9, 1999) (Laos),
appeal voluntarily dismissed, No. 99-36063 (9th Cir. Dec. 14, 1999)
Sarith Som v. Reno, C99-811Z (W.D. Wash. Dec. 10, 1999) (Cambodia),
no appeal timely filed
Sounboon Srimeuangsam v. Reno, C99-673Z (W.D. Wash. Oct. 10, 1999) (Laos),
affirmed, No. 00-35007 (9th Cir. Aug. 11, 2000)
Chandary Tep v. INS, C99-1161P (W.D. Wash. Dec. 20, 1999) (Cambodia),
affirmed, No. 00-35236 (9th Cir. May 31, 2000)
Sokha Thorng v. Reno, C990833P (W.D. Wash. Dec. 21, 1999) (Cambodia/Thailand),
appeal dismissed, No. 00-35292 (9th Cir. May 5, 2000)
Arutyun Tsavoukyan v. Reno, C99-955Z (W.D. Wash. Feb. 28, 2000) (Armenia),
notice of appeal filed, No. 00-35401 (9th Cir. Apr. 25, 2000)

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Bunny Vath v. Smith, C98-1363R (W.D. Wash. Oct. 22, 1999) (Cambodia),
no appeal timely filed
Praseuth Vilayphonh v. Reno, C99-699P (W.D. Wash. Nov. 23, 1999) (Laos),
no appeal timely filed

DISTRICT COURT DECISIONS POST MA: 29

Oleg Babak v. Reno, C99-1389P (W.D. Wash. July 7, 2000) (Ukraine)
Guram Chachava v. INS, C99-1519L (W.D. Wash. April 19, 2000) (Georgia),
notice of appeal filed, No. 00-35577 (9th Cir. June 15, 2000)
Phallar Cheng v. INS, C99-1730P (W.D. Wash. May 2, 2000) (Cambodia),
notice of appeal filed, No. 00-35607 (9th Cir. July 1, 2000)
Sau Van Dinh v. Reno, C99-1170R (W.D. Wash. June 19, 2000) (Vietnam),
notice of appeal filed, No. 00-35710 (9th Cir. Aug. 10, 2000)
Van Ham v. Reno, C99-1813L (W.D. Wash. Aug. 3, 2000) (Cambodia)
Minh The Hoang v. INS, C99-1097L (W.D. Wash. July 7, 2000) (Vietnam)
Vu Khanh Hoang-Tuan v. Reno, C99-1200C (W.D. Wash. July 24, 2000) (Vietnam)
Minh Van Luu v. Reno, C99-967C (W.D. Wash. June 5, 2000) (Vietnam),
notice of appeal filed, No. 00-35669 (9th Cir. Aug. 4, 2000)
Oscar Madrid-Canul v. Reno, C99-153C (W.D. Wash. May 8, 2000) (Cuba)
Pao Mao v. INS, C99-0580L (W.D. Wash. June 14, 2000) (Cambodia),
notice of appeal filed, No. 00-35713 (9th Cir. Aug. 10, 2000)
Mong Duc Ngo v. INS, C99-1334Z (W.D. Wash. July 7, 2000) (Vietnam)
Minh Hoang Nguyen v. Reno, C99-812Z (W.D. Wash. July 7, 2000) (Vietnam),
notice of appeal filed, No. 00-35733 (9th Cir. Aug. 18, 2000)
Saroeut Ourk v. INS, C99-1740P (W.D. Wash. May 25, 2000) (Cambodia),
notice of appeal filed, No. 00-35645 (9th Cir. Ju.y 21, 2000)
Raul Rodriguez-Suarez v. INS, C99-1336L (W.D. Wash. July 5, 2000) (Cuba)
Kao Chow Saechao v. Reno, C99-1781P (W.D. Wash. Aug. 8, 2000) (Laos/Thailand)
Samoeun Sareth v. INS, C99-196P (W.D. Wash. April 25, 2000) (Cambodia),
notice of appeal filed, No. 00-35549 (9th Cir. June 16, 2000)
Sengchanh Savath v. Reno, C99-1739P (W.D. Wash. Aug. 8, 2000) (Laos)
Pavel Shtyba v. Reno, C99-335L (W.D. Wash. June 15, 2000) (Russia/Ukraine),
notice of appeal filed, No. 00-35711 (9th Cir. Aug. 10, 2000)
Vieng Sombath v. Reno, C99-1936R (W.D. Wash. July 31, 2000) (Laos)
Lay Srey v. INS, C99-1090Z (W.D. Wash. April 11, 2000) (Cambodia),
notice of appeal filed, No. 00-35544 (9th Cir. June 8, 2000)
Seth Themala v. Reno, C99-834Z (W.D. Wash. July 7, 2000) (Laos)
Quoc Hung Tran v. INS, C99-1116Z (W.D. Wash. May 10, 2000) (Vietnam),
notice of appeal filed, No. 00-35671 (9th Cir. June 30, 2000)

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Phaivanh Vilaysack v. Reno, C99-1963R (W.D. Wash. Apr. 28, 2000) (Laos),
notice of appeal filed, No. 00-35578 (9th Cir. June 20, 2000)
Ilya Volynets v. INS, C99-1092Z (W.D. Wash. May 5, 2000) (Ukraine),
notice of appeal filed, No. 00-35578 (9th Cir. June 30, 2000)
Khuong Minh Vu v. INS, C99-2090C (W.D. Wash. June 2, 2000) (Vietnam),
notice of appeal filed, No. 00-35663 (9th Cir. Aug. 4, 2000)
Sanxay Xayadeth v. INS, C99-1295L (W.D. Wash. July 27, 2000) (Laos)
Viraphonh Xayaphet v. Reno, C9901729C (W.D. Wash. April 28, 2000) (Laos),
notice of appeal filed, No. 00-35564 (9th Cir. June 20, 2000)
Shi Ming Yan v. INS, C99-2062R (W.D. Wash. Aug. 4, 2000) (China)

To date, the Ninth Circuit has summarily affirmed only 12 district court orders granting relief pursuant to Ma of the approximately 65 appeals by petitioners currently pending in the Ninth Circuit. And, as of today's date, the Ninth Circuit has refused to summarily affirm the district court orders, instead opting for full briefing, in Dennis Vladimirovich Batyuchenko v. Reno, C99-185R (W.D. Wash. Sept. 10, 1999) (deportation to Belarus or Russia not reasonably foreseeable); *appeal pending,* No. 99-36104 (9th Cir.) ; Piotr Lepesh v. INS, C99-35R (W.D. Wash. Nov. 23, 1999) (deportation to Kazakhstan not reasonably foreseeable), *appeal pending,* No. 00-35083 (9th Cir.); Arutyun Tsavoukyan v. Reno, C99-955Z (W.D. Wash. Feb. 28, 2000) (deportation to Armenia not reasonably foreseeable), *appeal pending,* No. 00-35401 (9th Cir.)

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APPENDIX K

1917 ACT

Sect. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the Untied states, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime of moral turpitude, committed at anytime after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or

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protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by Immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

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APPENDIX L

1952 Statute

Former Section 242(c), 8 U.S.C. § 1252(c), 66 Stat. 208 (1952), reads, in pertinent part:

Sec. 242(c) [8 U.S.C. § 1252 (1952)]

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detain, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section . . .

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APPENDIX M

1990 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1991)) as amended by the Immigration Act of 1990 § 504, Pub. L. No. 101-649, 104 Stat. 4978, reads in relevant part:

Sec. 242 [8 U.S.C. 1252 (1991)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

* * *

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney

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General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

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CERTIFICATE OF SERVICE

No. 00-38

IN THE SUPREME COURT OF THE UNITED STATES

JANET RENO, et al.,

Petitioners,

v.

KIM HO MA,

Respondent.

I, Jay W. Stansell, a member of the Bar of this Court, hereby certify that on this 31st day of August, 2000, three copies of the Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, first-class postage prepaid, to Seth P. Waxman, Solicitor General of the United States of America, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001, counsel for Petitioners herein. I further certify that all parties required to be served have been served.

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(11)

Supreme Court, U.S.
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No. 00-38

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 00-38

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals' ruling that the Attorney General is without authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period set forth in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998) contradicts the express language of Section 1231(a)(6), which provides that certain aliens—including aggravated felons and any alien who "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal"—"*may be detained beyond the removal period*" (emphasis added). The Ninth Circuit's ruling squarely conflicts with the decision of the Tenth Circuit in *Duy Dac Ho* v. *Greene*, 204 F.3d 1045 (2000), which held that the Attorney General is authorized by Section 1231(a)(6) to detain such aliens and that that detention is constitutional. The result reached by the Ninth Circuit also cannot be reconciled with *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791, which sustained the continued detention of an alien under Section 1231(a)(6) in comparable circumstances. The ruling below significantly hinders the Attorney General's ability to enforce the immigration laws and to protect the public from criminal aliens in the Ninth Circuit, which covers a

substantial percentage of the aliens under final orders of removal who have been detained under Section 1231(a)(6). Review by this Court therefore is plainly warranted to determine the scope of the Attorney General's detention authority under Section 1231(a)(6).

1. Respondent concedes (Br. in Opp. 17, 22) that the Ninth Circuit's decision in this case squarely conflicts with the Tenth Circuit's decision in *Ho*. Respondent nonetheless contends (*id.* at 13, 17) that the Court should not resolve the conflict until the Tenth Circuit decides another case raising the issue. Respondent does not deny, however, that the Tenth Circuit's decision in *Ho* is final and constitutes binding precedent in that circuit. The circuit conflict therefore is ripe for review.[1] Moreover, the Third Circuit also has held that Section 1231(a)(6) authorizes the detention of aliens beyond the 90-day removal period even though they cannot be promptly removed. *Chi Thon Ngo* v. *INS*, 192 F.3d 390 (1999); see Pet. 23 n.14.[2]

---

[1] Contrary to respondent's contention (Br. in Opp. 17), the fact that, in light of *Ho*, an alien has sought initial en banc consideration in another case raising the same issues in the Tenth Circuit does not render the square conflict between the Ninth and Tenth Circuits unripe for review. To the contrary, it confirms that *Ho* is now binding circuit precedent. Furthermore, although Judge Brorby, in his dissent in *Ho*, disagreed with the majority's constitutional ruling, he agreed with the majority that the "plain language" of Section 1231(a)(6) authorizes the Attorney General to detain aliens in circumstances such as these pending their removal. 204 F.3d at 1060. There accordingly is no reason to believe that the Tenth Circuit would change its view on the statutory issue even if it granted rehearing en banc on the constitutional issue.

[2] The Third Circuit held in *Ngo* that the text of Section 1231(a)(6) authorizes the Attorney General to detain an alien beyond the 90-day removal period even where the progress toward the alien's ultimate removal is "agonizingly slow." 192 F.3d at 398. As respondent points out (Br. in Opp. 16 n.16), *Ngo* involved an excludable alien rather than an alien, like respondent, who previously was a lawful permanent resident. Section 1231(a)(6), however, now governs the detention of aliens in both categories. Although the Third Circuit stated in the portion of its opinion rejecting a constitutional challenge to the detention that it was not addressing the situation of aliens other than those who are excludable (see 192 F.3d at 398 n.7), it did not suggest that the text of Section 1231(a)(6) would apply differently to the two categories of aliens as a statutory matter.

The result in this case likewise cannot be reconciled with *Zadvydas*, which upheld the continued detention of an alien in comparable circumstances. The Fifth Circuit in that case did not question the Attorney General's statutory authority to detain the alien, see 185 F.3d at 286 (Section 1231(a)(6) "authorizes detention but makes it discretionary beyond an initial ninety day period"), and it held that the alien's continued detention (subject to periodic review of his dangerousness and flight risk) comported with due process, even though there was not yet a country willing to accept his return and it would be "difficult at best" to locate such a country. *Id.* at 291. The Fifth Circuit concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is *impossible*." *Id.* at 294. (emphasis added). It is clear that *Zadvydas* would be resolved differently by the Ninth Circuit, which requires the immediate release of an alien who cannot be removed in the reasonably foreseeable future. See Pet. App. 31a.

In the response we filed last May to the certiorari petition in *Zadvydas*, we pointed out that the result in that case is inconsistent with the result reached by the Ninth Circuit in this case. 99-7791 Br. in Opp. 16. We nevertheless opposed review in *Zadvydas* at that time because no court of appeals had reached a contrary result on the constitutional issue, the Fifth Circuit had not addressed (and the petitioner did not present to this Court) the statutory argument raised by respondent in this case, and review by the Court of the constitutional issue in *Zadvydas* would be premature in light

of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, which the government had then sought to eliminate by filing a petition for rehearing en banc in this case. *Id.* at 16-18. Subsequently, however, we informed the Court by letters dated June 9 and 20, 2000, that the Ninth Circuit had denied rehearing en banc and that the Solicitor General had authorized the filing of a certiorari petition in this case. The Court did not act on the certiorari petition in *Zadvydas* after we submitted those letters, and it remains pending.

We have now concluded – in light of the denial of rehearing en banc in this case, the subsequent filing of this certiorari petition and respondent's brief in opposition—that the Court should grant certiorari in *Zadvydas* as well as in this case. In his brief in opposition in this case, respondent places central reliance on the argument that the Ninth Circuit's statutory interpretation is supported by the doctrine that statutes should be interpreted in a manner that avoids a serious constitutional question See Br. in Opp. i, 3, 11, 14, 18-19, 26, 31-32. Because the constitutional arguments that respondent relies upon in defense of the Ninth Circuit's statutory ruling were rejected by the Fifth Circuit in *Zadvydas*, we believe that it would be appropriate for the Court to grant certiorari in this case and in *Zadvydas* to resolve both the statutory and the constitutional challenges to detention under Section 1231(a)(6) at the same time.

Respondent misapplies the constitutional avoidance doctrine by repeatedly characterizing his detention as "indefinite," which in his view raises a serious constitutional question in these circumstances. See Br. in Opp. i, 3, 11, 18, 20, 26, 28, 30, 32, 34. As we explain in the certiorari petition (at 26), however, the comprehensive administrative procedures for review of aliens in respondent's position (see 8 C.F.R. 241.4; Pet. App. 64a-76a, 90a-91a) forecloses any characterization of his detention as permanent or indefinite. Pet. 26-28. Respondent was afforded an ongoing possibility of

release if he no longer posed a risk of danger or flight. And INS's detention of respondent will necessarily cease upon his removal from this country—a matter on which progress is continuing to be made through international negotiations (see Pet. 17 n.10).[3] See *Zadvydas*, 185 F.3d at 291, 294 (alien's prolonged detention pending removal is not permanent or indefinite because the alien "may be released when it is determined that he is no longer either a threat to the community or a flight risk"; the alien is entitled to automatic, periodic administrative review of his custody; and it has not been clearly established that there is no meaningful possibility of locating a country that would accept the alien's removal or that removal is "impossible"). In any event, the Ninth Circuit's statutory interpretation is not limited to "indefinite" detention; it prohibits even one day of detention of an alien in respondent's position.

2. Quite aside from the existence of conflicting rulings in other circuits, the adverse impact of the decision below

---

[3] Respondent's discussion (Br. in Opp. 36-37 & nn.33, 34) of information concerning the government's ongoing negotiations with Cambodia over return of its nationals disregards the reality that the Executive Branch is dealing with ever-shifting international conditions and relations with various countries that are always difficult to predict, and it highlights the difficulties presented by a rule that requires federal courts to make their own predictions about the likelihood of removing aliens to particular countries. See Pet. 16 n.9, 29-30.

Published INS statistics show that the INS successfully removed two Cambodian nationals in fiscal year 1994, 14 in 1995 (two of whom were criminals), four in 1996, and ten in 1997. *1997 Statistical Yearbook of the Immigration and Naturalization Service* 180, 183 (Oct. 1999). We have been informed by the INS that the two removed in 1994, ten of the 14 in 1995, one of the four in 1996, and two of the ten in 1997 were removed to Cambodia. We have been further informed by the INS that it removed 16 Cambodians to Cambodia in 1998, 13 in 1999, and seven in the first ten months of fiscal year 2000. The INS's ability to remove such aliens was based on varying circumstances, such as possession of current travel documents or the alien's family obtaining travel documents directly from the Cambodian government.

within the Ninth Circuit itself has grown substantially even since the certiorari petition was filed. See Pet. 15-16. As of September 15, 2000, there are approximately 487 habeas corpus actions currently pending in the district courts in the Ninth Circuit and approximately 149 appeals currently pending in the Ninth Circuit involving legal issues that are the same or substantially similar to those presented by this case, and the Ninth Circuit has already summarily affirmed district court release orders in eleven additional cases in light of the decision below. So long as the Ninth Circuit's decision in this case stands as controlling precedent in that Circuit, the district courts are required in such cases to order the release by the INS of any alien who is situated similarly to respondent, regardless of the degree of danger or risk of flight he presents if released.

Respondent attempts to discount that broad impact by asserting (Br. in Opp. 14) that the courts in the Ninth Circuit are not summarily releasing aliens, but "continue to reach individualized release decisions based upon the facts of the particular case." See also *id.* at 23; Br. in Opp. App. 21a-24a. Those assertions are misleading. Under the Ninth Circuit's ruling, the facts pertaining to the risk of danger or flight posed by the release of a particular alien are wholly irrelevant if a court determines that there is not a reasonable likelihood that the alien will be removed in the reasonably foreseeable future. Pet. App. 23a, 25a. Accordingly, when a court finds that there is not a reasonable likelihood of removing an alien in the reasonably foreseeable future, the alien is ordered released, *regardless* of the basis for the Attorney General's decision under Section 1231(a)(6) to detain the alien. Indeed, respondent himself elsewhere insists (Br. in Opp. 4 n.2) that the risk of danger or flight posed by his release is not relevant to the question of statutory construction presented by this case—an assertion that cannot be squared with Section 1231(a)(6)'s express authorization for the Attorney General to detain an alien

"who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

3. Respondent contends (Br. in Opp. 13, 21-22) that this Court's review of the statutory question should await the INS's adoption of its final regulations further formalizing the administrative process for periodic review of decisions to detain aliens such as respondent under Section 1231(a)(6). Respondent suggests (Br. in Opp. 13) that "the INS may remedy any present conflict on its own," and asserts (*id.* at 21 & n.21) that the final regulations adopted by the INS may be consistent with the Ninth Circuit's ruling. That suggestion is without merit.

The very premise of the proposed regulations is that the Attorney General *does* have the authority, as both a statutory and a constitutional matter, to detain aliens like respondent, who cannot be returned to their country of nationality for the time being, but who are aggravated felons or aliens found by the Attorney General to pose a risk of flight or danger to the community if released. 65 Fed. Reg. 40,540 (June 30, 2000). The proposed regulations are designed to clarify and codify the procedures for deciding how to exercise that authority. Any delay in resolving questions concerning the scope of the Attorney General's authority under Section 1231(a)(6) will undermine the validity of the INS's regulations, which are designed to ensure the even-handed exercise of that authority nationwide. Indeed, if the Ninth Circuit's ruling remains binding precedent, courts will require the Attorney General to release all aliens in respondent's position in that circuit, without the exercise of the individualized judgment and discretion that Section 1231(a)(6) expressly contemplates and that her proposed regulations are designed to implement.

4. Respondent argues (Br. in Opp. 23-25) that further review of this case is not warranted because continued detention of criminal aliens such as respondent is not necessary.

Respondent asserts that the INS is "still able to supervise" aliens after they are released and is able to "compel their appearances." *Id.* at 23. But supervision conditions can be violated, as they were by respondent when he assaulted a female companion, thus posing a danger to the community. That is why the INS's custody determination takes into account, among other things, the alien's probation history and evidence of any rehabilitative effort or recidivism. See 8 C.F.R. 241.4(a); Pet. App. 78a. Similarly, every year many criminals and aliens fail to respond to notices to appear for various legal proceedings. That is why the INS's custody determination takes into account any history of failures to appear. 8 C.F.R. 241.4(a); Pet. App. 78a. In any event, respondent simply ignores the fact that Congress explicitly provided that an alien's "risk to the community" and likelihood of "comply[ing] with the order of removal" are factors the Attorney General may take into account in making detention decisions under Section 1231(a)(6).

Respondent's fact-bound attempts (Br. in Opp. 4 n.2; 7 & nn.8, 9; 8 n.10; 10 n.12; 21 n.21; 24-25 & nn.25, 26) to convince the Court that the INS's continued detention of him was not necessary because he did not pose a danger to the community and would abide by release conditions ignore both the record in this case and the fact that, under the court of appeals' ruling, the INS is prohibited from detaining respondent and all other aliens comparably situated *whether or not* they pose a serious danger to the community or would comply with release conditions.[4]

[4] The letter informing respondent of the INS's decision to continue him in detention specifically noted that, in making that decision, the assistant district director considered numerous factors, including respondent's criminal convictions, "[o]ther criminal history," "[e]vidence of rehabilitative effort or recidivism," and "[p]rior immigration violations and history." Pet. App. 78a. As we have explained (Pet. 6 n.2), respondent's immigration file revealed that he had been associated with a gang "for some time" and had been arrested on two other occasions with one of the codefendants in his manslaughter case (see A.R. 50), contrary to respondent's assertion (Br. in Opp. 7 n.8) that his history of gang activities "consists solely of the manslaughter offense for which he was convicted." The record also revealed that the immigration judge who had refused respondent's request for release while his removal proceedings were pending had found that respondent posed a danger if released because of the lack of any evidence that he had been rehabilitated during his state imprisonment term and because he had denied his involvement in gang activity, denied knowledge of the killing, and denied abusing drugs, despite information to the contrary. See Pet. 6. Finally, respondent's post-release arrest on charges of assaulting a female companion reflects his continued involvement in violent conduct that the State is attempting to prosecute through its appeal of the dismissal of those charges. See Pet. 13 n.6; Br. in Opp. 10 n.12.

5. As we demonstrate in the certiorari petition (at 17-23), the court of appeals' construction of Section 1231(a)(6) is fatally flawed. The court rewrites an unambiguous statutory provision that was specifically designed, following a series of legislative amendments, to authorize the Attorney General to detain dangerous criminal aliens who are under final orders of removal.

The court of appeals' interpretation of Section 1231(a)(6) to allow detention beyond the 90-day period only for a "reasonable" time, Pet. App. 25a, finds no support in the text of the statute. To the contrary, the statute's text, structure, and history reveal that Congress intended that the Attorney General be authorized to detain aggravated felons and aliens who she found to pose a risk to the community or a likelihood of noncompliance with the removal order. Pet. 17-23.

In defending the Ninth Circuit's addition of a judicially fashioned "reasonable" time limitation to Section 1231 (a)(6), respondent relies (Br. in Opp. 27-28, 30) on lower-court decisions rendered approximately 70 years ago under statutory provisions repealed in 1952. Those long-since superseded statutory provisions and decisions have no bearing on the present question.

As we explain in the certiorari petition (at 18-22), since at least 1990, Congress has unequivocally exempted the deten-

tion of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to other aliens. Indeed, Congress has consistently allowed, and at times *mandated*, that the Attorney General continue to detain aggravated felons. Nothing in the last decade of amendments to the Immigration and Nationality Act suggests that Congress intended that after 1996, instead of having six months to effectuate removal with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable" time beyond 90 days, which in this case was deemed no time at all.

To the extent respondent identifies any ambiguity in the statute (see Br. in Opp. 26), however, that is no basis for adoption of the court of appeals' interpretation. Rather, it is the INS's plainly reasonable interpretation of Section 1231 (a)(6) that is entitled to judicial deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). See Pet. 18.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *Zadvydas* v. *Underdown*, No. 99-7791, in which we are today filing a supplemental brief suggesting that the Court grant certiorari in that case as well.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 2000

AMICUS CURIAE

BRIEF

IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-38

JANET RENO, *et al.*,

Petitioners,

v.

KIM HO MA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk of the Court. Counsel for Respondent Kim Ho Ma has declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many

supporters who live within the Ninth Circuit. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to combat illegal immigration and to ensure that aliens who engage in criminal activities are excluded from American society. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee,* 119 S. Ct. 936 (1999); *Ogbomon v. United States,* 117 S. Ct. 725 (1997); *Immigration and Naturalization Service v. Elramly,* 117 S. Ct. 31 (1996). WLF also filed a brief in the Ninth Circuit in support of the petition for rehearing in this case.

AEF is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* before the Court on immigration-related issued on a number of occasions.

As a result of the Ninth Circuit's decision in this case, a criminal alien at this moment is walking freely on the nation's streets, despite having been convicted of a homicide, despite being subject to a final order of deportation, and despite repeated INS determinations that he is a danger to the community. Moreover, as Petitioners' brief notes, hundreds of other dangerous criminal aliens may also soon be foisted on the public as a result of the Ninth Circuit's decision. *Amici* seek to file an *amicus curiae* brief in this case because they fear for the public safety if the panel's decision is allowed to stand.

Amici have long been involved in efforts to protect the general public from criminal activity and to promote the rights of those who fall victim to crime. The Ninth Circuit's decision discusses at great length the alleged statutory rights

of a convicted killer, but does not seem to have taken into account the rights of those who are threatened by Kim Ho Ma's continued presence in American society. *Amici* believe that if they are allowed to participate in these proceedings, their brief will provide a perspective that is distinct from that of any of the parties.

For the foregoing reasons, the Washington Legal Foundation and the Allied Educational Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Date: August 7, 2000

QUESTION PRESENTED

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. § 1231(a)(6) if the alien cannot be removed from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released, and the alien's custody is subject to periodic administrative review.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate the Statement contained in the Petition for a Writ of Certiorari.

In brief, Kim Ho Ma is a 23-year-old Cambodian national who has been a permanent resident of the United States since 1987. In April 1995, Ma, along with four other gang members, ambushed and shot a fellow gang member and left him to bleed to death. Ma was arrested and charged with murder. At his 1996 trial, the jury could not reach a verdict on second-degree murder charges and convicted Ma of first-degree manslaughter. Petition Appendix ("Pet. App.") 56a. Ma was not retried on the second-degree murder charge.

After serving 26 months of his 38-month sentence, Ma was released from State custody in June 1997 and transferred to the custody of the Immigration and Naturalization Service ("INS"). In July 1997, the INS charged Ma with being subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien who had been convicted of an aggravated felony. Ma contested the removal proceedings, but the INS issued an order of removal for Ma, which became final on October 26, 1998. Pet. App. 5a. Throughout the removal proceedings, Ma remained in the custody of the INS, which is *required* by law to detain -- pending removal -- any alien who has been convicted of an aggravated felony. 8 U.S.C. § 1226(c)(1)(B).[2]

[2] It is uncontested that Ma's homicide falls within the "aggravated felony" category. *See* 8 U.S.C. § 1101(a)(43)(F). Section 1226(c)(2) provides for the release of aliens detained pursuant to § 1226(c)(1)(B) only under very limited circumstances not relevant to this case.

After the removal order became final, the INS began the process to remove Ma to Cambodia. To date, Cambodia has not issued the requisite travel papers for Ma. Although U.S. and Cambodian officials have met to discuss a repatriation agreement between the countries, "Ma's deportation to Cambodia is far from imminent." Pet. App. 59a.

For the first 90 days following the date on which Ma's order of removal became final, the INS continued to detain *Ma* pursuant to 8 U.S.C. § 1231(a)(2), which *requires* that, during that 90-day period, the INS detain any alien who has been determined removable based on commission of an aggravated felony. Thereafter, the INS detained Ma pursuant to 8 U.S.C. § 1231(a)(6), which provides that *any* such alien "may be detained beyond the [90-day] removal period."[3]

Although § 1231(a)(6) grants the INS authority to detain beyond the 90-day removal period *any* alien deemed removable based on commission of an aggravated felony, the INS has not chosen to exercise its detention powers as sweepingly as permitted by the statute. Rather, INS regulations provide that the INS will not necessarily detain such aliens past the 90-day removal period unless they are deemed a threat to the community or a risk of flight. *See* 8 C.F.R. § 241.4, Pet. App. 90a-91a. *See also* INS Proposed Rule, "Detention of Aliens Ordered Removed," 65 Fed. Reg. 40540 (June 30, 2000). INS regulations also provide for periodic review of the cases of all removable aliens being held beyond the 90-day removal period. 8 C.F.R. § 241.2.

[3] Section 1231(a)(6) *also* authorizes the INS to detain removable aliens beyond the 90-day removal period if the Attorney General determines the alien "to be a risk to the community or unlikely to comply with the order of removal."

criminal aliens; given that background, it is inconceivable that Congress intended (as the Ninth Circuit held) to *relax* detention rules for removable aliens who have been convicted of a aggravated felony.

Finally, there is serious question whether the federal courts possess subject matter jurisdiction to consider Ma's claim that the INS detained him in violation of § 1231(a)(6). The Court should grant review in order to consider that important jurisdictional question as well.

I. THIS CASE RAISES IMPORTANT PUBLIC SAFETY ISSUES THAT MERIT REVIEW

Kim Ho Ma is a convicted killer. The Ninth Circuit did not contest that by virtue of having committed a homicide, Ma has forfeited his right to remain a part of American society. But given the current relationship between the United States and Cambodia, immediate deportation of Ma to Cambodia is not a realistic prospect. Thus, either Ma must be detained by the INS for the near-term until his removal can be arranged, or a convicted killer must be released into American society.

The Ninth Circuit ruled that Congress, in adopting § 1231(a)(6), came down against detention of criminal aliens whose removal cannot be effected within 90 days of a final order of removal because their native country will not take them back. Regardless whether that ruling is a proper reading of § 1231(a)(6), it is uncontestable that the ruling raises serious public safety issues. The importance of those issues is reason enough by itself to grant the petition.

As the Petition points out, the Ninth Circuit's decision is having a significant impact on the cases of numerous

criminal aliens besides Ma. The INS has appeals pending in 59 Ninth Circuit cases in which criminal aliens have been ordered released from detention under circumstances similar to Ma's, and is preparing to file notices of appeal in another 40 cases. Pet. 15. Moreover, there are 400 other cases raising similar challenges to detention in various district courts in the Ninth Circuit. Pet. 16. In light of the Ninth Circuit's ruling in this case, one can expect that each of those criminal aliens will be released from detention unless this Court grants review. If other federal appeals courts decide to adopt the Ninth Circuit's rationale, the disruption of customary immigration law enforcement could spread nationwide.

It is no answer to such concerns to assert that no one can be certain that those released into society will continue their life of crime. *See, e.g.*, Dist. Ct. Opinion, Pet. App. 60a (the government "has failed to advance a single reason for its belief that [Ma] is a danger to society, beyond the simple fact of his conviction."). To the contrary, it is a *statistical certainty* that a significant percentage of criminal aliens who are subject to a final order of removal will, if released, engage in criminal activity.

A recent major study of criminal aliens conducted by Los Angeles County concluded that a significant percentage of deportable aliens released from jail are rearrested within one year, before their deportation can be effected. Los Angeles Countywide Criminal Justice Coordination Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County" [hereinafter, "Impact"], July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year* (40%),

and those 772 had been arrested a total of 1,522 time. Impact at iv. Moreover, those figures likely considerably understate the rearrest rate, because 974 of the 1,875 criminal aliens were actually deported at or soon after the time of their release. *Id.* If those 974 individuals are eliminated from the study on the assumption that they were not on the streets long enough prior to deportation to have been arrested, then the actual one-year rearrest rate rises to 86% (772 out of 901).

Recent congressional hearings have focused on high recidivism among criminal aliens released by the INS. INS Commissioner Doris Meissner testified at a March 2000 hearing of the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary that between October 1994 and May 1999, the INS released 35,318 criminal aliens rather than detaining them pending deportation. Meissner testified that 11,605 of those released have gone on to commit "serious crimes," including at least 1,376 who committed "violent crimes." M. Hedges, "Criminal Aliens Often Released Instead of Deported," Scripps Howard News Service, March 9, 2000. Those 1,376 individuals committed a total of 1,845 violent crimes, including 98 homicides, 142 sexual assaults, 44 kidnappings, 346 robberies, and 1,214 assaults. *Id.*

Respondent Ma can be added to that list of recidivists. Following his October 25, 1999 release from detention, Ma was arrested on March 30, 2000 for a vicious assault. Ma is free on bail while Washington State authorities continue to pursue those charges. Pet. 13.

In sum, statistical evidence demonstrates conclusively that the Ninth Circuit's decision, by increasing the number of alien criminals released from detention pending removal,

will lead to a measurable increase in crime, including violent crime. The public safety concerns raised by the imminent release of hundreds of criminal aliens covered by the Ninth Circuit's decision warrant review of this case.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS AND IS INCONSISTENT WITH THE PLAIN LANGUAGE OF § 1231(a)(6)

The Court should also grant review because the decision below conflicts with the decision of at least two other federal appellate courts and conflicts with the plain language of 8 U.S.C. § 1231(a)(6).

Section 1231(a)(6) provides that any removable alien who (such as Ma) has been convicted of an "aggravated felony" "may be detained beyond the [90-day] removal period" by the INS. The Ninth Circuit correctly noted that the provision does not specify a time limit on the length of any detention following expiration of the removal period. But the Ninth Circuit drew an unwarranted conclusion from the absence of a time limit; it concluded that one could draw no inference regarding congressional intent from the absence of a time limit. Pet. App. 10a. The court thought the statutory language could equally plausibly be read as authorizing detentions to continue indefinitely, "for a reasonable time," or some other temporal measure. *Id.* The language of § 1231(a)(6) cannot plausibly be read in that manner. When a statute authorizes a government agency to do something under specified circumstances (*e.g.*, detain removable aliens who have been convicted of an aggravated felony), there is no reason to infer a congressional limit on the period of time within which the agency is authorized to act, in the absence of language imposing such a time limit.

Such an inference is particularly unjustified in the case of § 1231(a)(6). Congress authorized the detention of removable aliens who have committed an aggravated felony beyond the 90-day removal period because of a concern that such felons would commit other crimes if released. That concern does not lessen simply because one month, six months, or six years have elapsed since the expiration of the removal period. Accordingly, there is *no* reason to infer that Congress intended to impose a time limit on the detention of such removable aliens.

In any event, the INS's conclusion that § 1231(a)(6) authorizes indefinite detentions is a plausible interpretation of that statute. The INS's conclusion is entitled to deference, particularly in light of the broad powers granted to the political branches of government in immigration-related matters. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Ninth Circuit concluded that such deference is unwarranted in cases in which the doctrine of "constitutional doubt" arises. Pet. App. 10a n.13. But that conclusion robs the political branches of the broad discretion they are due regarding immigration policy. The Court has made plain that the deference to which the political branches of government are entitled extends not merely to the interpretation of ambiguous statutes but also to the drawing of lines between constitutional and unconstitutional government policy. For example, the Court has long held that immigration-control personnel are not held to the same constitutional standards as other law enforcement officials. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (denying a Fourth Amendment challenge to Border Patrol highway checkpoints at which cars were randomly stopped even in the absence of individualized suspicion of criminal activity; the need to

secure areas near the border outweighs citizens' Fourth Amendment interest in not being stopped). *See also, INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not bar use at deportation hearing of admissions made by alien following illegal arrest).

The INS's interpretation of § 1231(a)(6) is also entitled to deference because the INS is exercising its detention authority far more sparingly than the plain language of the statute would allow. On its face, § 1231(a)(6) permits the INS to detain beyond the removable period *any* removable alien who has committed an aggravated felony. However, the INS has issued regulations making clear that the only such removable aliens who will be subject to indefinite detention are those who are also determined to be a risk to the community or unlikely to comply voluntarily with the order of removal, and any detained alien is entitled to periodic review of such determinations. 8 C.F.R. §§ 241.2 and 241.4. In other words, the INS has chosen voluntarily to limit use of its indefinite detention powers to those aliens with respect to whom society's rationale for detention is strongest. The Ninth Circuit's conclusion that Congress could not possibly have intended such a result (Pet. App. 24a), even though that result is consistent with the statutory language and directly serves society's interests, warrants review by this Court.

Moreover, as the INS has pointed out, § 1231(a)(6) as interpreted by the Ninth Circuit would constitute a substantial restriction on the INS's previously existing detention powers. Yet § 1231(a)(6) was adopted in September 1996 as part of the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, a law designed to hasten the removal of illegal

aliens and to protect citizens from alien criminals.[4] It is highly unlikely that such a law would have been a vehicle for Congress to decrease the INS's powers to detain removable aliens pending removal.

Finally, as the Ninth Circuit acknowledged (Pet. App. 20a n.23), its interpretation of § 1231(a)(6) is in direct conflict with the Tenth Circuit's interpretation. *Ho v. Greene*, 204 F.3d 1045, 1057 (10th Cir. 2000) (§ 1231(a)(6) "places no time limit on the detention of aliens whose detention it authorizes. . . . Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens . . . who cannot be removed within the ninety-day removal period."). The Ninth Circuit's belief that indefinite detention of removable aliens such as Ma raises serious constitutional problems conflicts with the rationale of the Fifth Circuit in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), *petition for cert. pending*, No. 99-7791, which rejected a constitutional challenge to indefinite detention under § 1231(a)(6). The Court should also grant review in order to resolve those conflicts.

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[4] *See, e.g.*, Senate Committee on Government Operations, "Criminal Aliens in the United States," 104 S. Rpt. 48 (April 7, 1995) (recommending legislation to ensure increased detention of alien criminals prior to deportation). The report took issue with those, such as the district court (Pet. App. 60a), who are unwilling to accept, in the absence of direct evidence, that a removable alien who has committed an aggravated felony is a risk of flight. The report stated:

> Many criminal aliens who are released pending their deportation never appear for their deportation proceedings. In fact, over 20 percent of non-detained criminal aliens do not appear for their deportation proceedings. As of 1992, the INS reported to Congress that some 10,875 aliens convicted of aggravated felonies had failed to report for deportation proceedings.

III. THE FEDERAL COURTS LACK JURISDICTION TO REVIEW DECISIONS OF THE ATTORNEY GENERAL TO DETAIN ALIEN CRIMINALS PENDING REMOVAL

The Court should grant review in this case for the additional reason that the Ninth Circuit appears to have issued its decision despite lacking jurisdiction over the subject matter.

Before reaching the merits of Ma's claim that the INS may not detain him, the Ninth Circuit *sua sponte* considered whether it lacked subject matter jurisdiction to consider the claim as a result of the jurisdictional limitations imposed by 8 U.S.C. § 1252(g). The panel correctly determined that § 1252(g) does not preclude exercise of jurisdiction over this case. Pet. App. 3a n.3. *See Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 943-45 (1999) (§ 1252(g) does not preclude review of detention decisions). The panel failed to consider, however, the effect of another recently adopted statute that also imposes limitations on the exercise of jurisdiction in immigration cases: 8 U.S.C. § 1226(e). That statute is directly applicable to this case and precludes consideration of any statutorily-based objections to Ma's detention.

Section 1226, entitled "Apprehension and detention of aliens," grants the Attorney General (or her designate, the INS) extensive power to detain aliens pending deportation. In particular, § 1226[c] provides for the detention of "criminal aliens." It states that the INS "*shall* take into custody any alien who . . . is deportable by reason of having committed any offense covered in section . . .

237(a)(2)(A)(iii)." 8 U.S.C. § 1226(c)(1)(B).[5] Section 1226(c)(2) provides for the release of aliens detained pursuant to § 1226(c)(1) only under very limited circumstances that are not relevant to this case. Ma was taken into custody by the INS in 1997 pursuant to § 1226(c), following his release from state prison.

Congress has provided for extremely limited judicial review of decisions to detain aliens pursuant to § 1226. The judicial review provision states in relevant part:

> No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e).

The Ninth Circuit held that, notwithstanding Congress's *command* to the INS to take criminal aliens such as Ma into custody following completion of their prison sentences, Congress simultaneously mandated the release, 90 days after entry of a final removal order, of dangerous criminals who cannot be removed from the country because no country is willing to accept them. The panel based that holding on 8 U.S.C. § 1231(a)(6) -- notwithstanding the fact that § 1231(a)(6) is a confirmation of authority to the INS to continue to detain criminal aliens who cannot be removed within the 90-day removal period. In other words, the panel interpreted § 1231(a)(6) as a statutory limitation on the

---

[5] Section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), provides for the removal of any alien convicted of an "aggravated felony" at any time after admission. As noted above, Ma does not contest that the crime for which he was convicted constitutes an "aggravated felony."

power (indeed, the mandate) that the INS otherwise would have had under § 1226(c) to detain Ma indefinitely.

In arriving at that counter-intuitive statutory interpretation, the panel acted in disregard of the limitation on its subject matter jurisdiction, as set forth in § 1226(e). That provision states unequivocally that "no court" shall set aside any INS action under § 1226 (including, as here, detention decisions under § 1226(c)(1)) "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The Ninth Circuit has done precisely that which § 1226(e) forbids: it has affirmed the district court's order overturning the INS's detention of Ma pursuant to § 1226(c)(1).

The court purported to exercise jurisdiction over this case under the statutory habeas corpus provision, 28 U.S.C. § 2241. But nothing in § 1226(e) suggests that Congress intended to create an exception for statutory habeas corpus petitions -- an exception that would, of course, essentially emasculate the limitation on jurisdiction. Rather, Congress used unequivocal language in barring federal court jurisdiction; "no court" quite clearly means "no court."

The Ninth Circuit's decision to exercise jurisdiction is in clear conflict with the rationale of a recent Seventh Circuit decision. In *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), the Seventh Circuit addressed the habeas claim of a criminal alien being detained by the INS (pursuant to 8 U.S.C. § 1226(c)(1)) while he was appealing an administrative removal order. The alien contended that his continued detention during the appeals process violated his rights under the Due Process Clause of the Fifth Amendment. The INS argued that § 1226(e) precluded the court's exercise of jurisdiction over the case. The Seventh Circuit held that

§ 1226(e) prohibits courts from considering claims that the INS lacks authority under § 1226 to continue to detain an alien, but "does not purport to foreclose [constitutional] challenges to § 1226(c) itself." *Parra*, 172 F.3d at 957.[6] Thus, under the Seventh Circuit's rationale, the lower federal courts lack subject matter jurisdiction to hear claims (such as the claim recognized by the Ninth Circuit) that some federal statute limits the intended scope of § 1226(c). The Court should grant review in order to determine the scope of the federal judiciary's subject matter jurisdiction to hear statute-based challenges to INS decisions to detain removable aliens who have committed aggravated felonies.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court grant the Petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 7, 2000

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[6] Because the criminal alien in *Parra* was, in fact, challenging the constitutionality of his detention pursuant to § 1226(c), the Seventh Circuit determined that it possessed jurisdiction to consider that challenge, a challenge it summarily rejected.

Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

(12)

No. 00-38

In the Supreme Court of the United States

JANET RENO, ET AL., PETITIONERS

v.

KIM HO MA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JULY 5, 2000
CERTIORARI GRANTED OCTOBER 10, 2000

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
(SEATTLE)

No. 99-CV-151

KIM HO MA, PETITIONER

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	ENTRY
2/2/99	1	PETITION FOR 2241 WRIT OF HABEAS CORPUS by petitioner Kim Ho Ma Receipt No. 256020 (ss) [Entry date 02/08/99]

* * * * *

DATE	DOCKET NUMBER	ENTRY
4/22/99	10	ORDER ON LEAD CASES & STAY OF RELATED CASES by Judge Coughenour, Judge Rothstein, Judge Zilly, Judge Lasnik & Judge Dwyer. This case is designated as a lead case. The Order of Reference is hereby vacated. Briefing Schedule: Lead case petitioners briefs due by 4/30/99 (50 pg. max.); Non-lead case petitioners briefs due by 5/10/99 (25 pg. max); Respondents briefs due by 5/21/99 (50 pg. max); Lead case petitioners reply brief due by 5/28/99 (25 pg. max); Cnsl to file an orig. plus 9 copies (1 for each file and 1 for each District Judge); Oral arg. is scheduled for 6/17/99 at 1:30 before a Panel of Judge Coughenour, Judge Rothstein, Judge Zilly, Judge Lasnik and Judge Dwyer. All non-lead cases are stayed, except the court will rule on ifp motions, appt. of cnsl motions, service of process and any dismissal orders. Case reassigned to Judge Robert S. Lasnik, , (cc: counsel, Judge) (sl) [Entry date 04/23/99]

* * * * *

DATE	DOCKET NUMBER	ENTRY
4/30/99	16	OPENING BRIEF OF PETITIONERS IN SUPPORT OF PETITIONS FOR WRITS OF HABEAS CORPUS/MEMORANDUM by petitioner in support re: habeas corpus petition [1-1] (vk) [Entry date 05/06/99]

* * * * *

5/6/99	18	CERTIFIED ADMINISTRATIVE RECORD by respondent INS (FILED IN EXPANDO) (gm) [Entry date 05/10/99]

* * * * *

5/14/99	21	DECLARATION of Jay Ashri Srikantiah re motion for leave to participate as amici curiae by ACLU-IRP [20-1] (vk) [Entry date 05/18/99
5/14/99	22	MEMORANDUM in support of motion for leave to participate as amici curiae by ACLU-IRP [20-1] (vk) [Entry date 05/18/99]

* * * * *

DATE	DOCKET NUMBER	ENTRY
5/18/99	24	ORDER GRANTING MOTION TO AMEND PETITION by Judge Robert S. Lasnik: GRANTING motion to amend petition [12-1] (cc: counsel, Judge) (vk) [Entry date 05/19/99]
		* * * * *
5/18/99	27	AMENDED PETITION FOR WRIT OF 2241 HABEAS CORPUS by petitioner Kim Ho Ma (rs) [Entry date 05/24/99]
5/21/99	25	ORDER by Chief Judge John C. Coughenour GRANTING motion for leave to participate as amici curiae by ACLU-IRP [20-1] and petitioners' motion for permission to file a corrected copy of their opening brief (cc: counsel, Judge, ACLU) (vk)
5/21/99	26	AMENDED OPENING BRIEF OF PETITIONERS IN SUPPORT OF PETITIONS FOR WRITS OF HABEAS CORPUS [1-1] (vk)

DATE	DOCKET NUMBER	ENTRY
5/21/99	28	RESPONSE by respondent to amended habeas corpus petition [27-1] (rs) [Entry date 05/24/99]
5/21/99	29	INS EXHIBITS to response [28-1] re amended petition (rs) [Entry date 05/24/99]
5/28/99	30	REPLY BRIEF by petitioner Kim Ho Ma to habeas corpus petition [27-1] (rs) [Entry date 06/01/99]
5/28/99	31	EXHIBITS by petitioner in support of reply brief [30-1] (rs) [Entry date 06/01/99]
		* * * * *
6/17/99	37	PETITIONERS' SUPPLEMENTAL EXHIBITS (vk)
		* * * * *
6/17/99	40	EXHIBIT "L" by INS (vk) [Entry date 06/23/99]

DATE	DOCKET NUMBER	ENTRY
		* * * * *
6/18/99	38	TRANSCRIPT of proceedings for the following date(s): 6/17/99 CR initials: L Kelly (kn)
		* * * * *
7/9/99	44	JOINT ORDER by All District Judges: In the orders that follow, we individually apply the due process framework in the lead cases to determine whether continued detention violates the petitioner's right to substantive due process. The court shall provide for expedited review of the remaining petitions that have been stayed pursuant to the 4/22 and 6/29 orders. To that end, the govt is directed to file a status report and recommendation in each of the stayed cases within 20 days of entry of this order. Counsel for each petitioner may file a response in the respective case within 10 days. Each judge

DATE	DOCKET NUMBER	ENTRY
		shall then consider the petitions pending before him/her. (cc: counsel, Judge) (rs)
7/13/9	45	ORDER SETTING HEARING by Judge Robert S. Lasnik: The Court will schedule a hearing in this matter. The parties are directed to contact this Court's deputy clerk to schedule such a hearing. (cc: counsel, Judge) (gm)
		* * * * *
9/8/99	48	STATUS REPORT AND RECOMMENDATION by respondents (vk)
9/8/99	49	RESPONDENTS' EXHIBITS re: status memorandum [48-1] (vk)
		* * * * *
9/9/99	51	RESPONSE by petitioner re: respondents' status memorandum [48-1] (FILED IN EXPANDO) (vk) [Entry date 09/13/99]

DATE	DOCKET NUMBER	ENTRY
9/29/99	52	ORDER by Judge Robert S. Lasnik GRANTING petitioner's petition for writ of habeas corpus and respondents are ordered to release Kim Ho Ma subject to appropriate conditions [0-0]case termed (cc: counsel; Judge) (vk)
9/29/99	53	ORDER by Judge Robert S. Lasnik staying order granting petitioner the writ of habeas corpus pending further order of the court (cc: counsel, Judge, INS) (vk)
9/29/99	54	MOTION by respondents for stay pending appeal (vk) [Entry date 09/30/99]
9/29/99	55	RESPONSE by petitioner in opposition to respondents' motion for stay pending appeal [54-1] (vk) [Entry date 09/30/99]
9/30/99	56	REPLY by respondent to petitioner's opposition to respondent's motion for stay pending appeal [55-1] (vk)

DATE	DOCKET NUMBER	ENTRY
9/30/99	57	ORDER by Judge Robert S. Lasnik: The Ct entered an order granting petitioner the writ of habeas corpus, & the govt requested a stay pending appeal. The Ct finds a stay is not warranted. The govt may have up to 7 days w/in which to request a stay from the Ct of Appeals before this Ct's order must be executed. (cc: counsel, Judge, INS) (gm)
10/6/99	58	NOTICE OF APPEAL by respondent INS from Dist. Court decision [44-1, 57] (cc: CCA, RLS, counsel) (lb)
		* * * * *
10/12/99	59	ORDER (CCA 99-35976) The court, on its own motion, stays the district court's order releasing petitioner, Kim Ho Ma, pending full consideration of the emergency motion for stay pending appeal filed on 10/6/99. (lb)

DATE	DOCKET NUMBER	ENTRY
10/25/99	60	ORDER (CCA 99-35976) Appellant's emergency motion for stay pending appeal is denied. Petitioner shall be released subject to appropriate conditions before 5:00pm on Monday, 10/25/99. (lb)
11/3/99	61	NOTICE of change of petitioner's custody status by respondent INS (vk) [Entry date 11/04/99] [Edit date 11/08/99]
11/5/99	62	RESPONSE by petitioner re: respondent's notice of change of custody status [61-1] (vk) [Entry date 11/08/99]
11/5/99	63	AMENDED NOTICE by respondent INS of change of petitioner's custody status, and consolidation and expedition of appeals (vk) [Entry date 11/08/99]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35976

KIM HO MA, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE;
JANET RENO, ATTORNEY GENERAL;
RICHARD C. SMITH, DISTRICT DIRECTOR,
RESPONDENTS-APPELLANTS

DOCKET ENTRIES

DATE	ENTRY

* * * * *

10/6/99	Filed Appellant INS, Appellant Janet Reno, Appellant Richard C. Smith emergency motion to stay further action. [99-35976] served on 10/6/99 (MOATT) (sf) [99-35976]

DATE	ENTRY
10/7/99	Filed Appellant INS, Appellant Janet Reno, Appellant Richard C. Smith emergency motion for a temporary stay pending this court's disposition of the emergency motion for a stay pending appeal; ; served on 10/6/99 (MOATT) (ft) [99-35976]
10/7/99	Filed order MOATT (J. C. WALLACE) the ct, on its own mtn, STAYS the DC's order releasing petitioner, Kim Ho Ma, pending full consideration of the emergency mtn for stay pending appeal filed on 10/6/99. (serve only per MOATT) [99-35976] (rc) [99-35976]
10/8/99	Filed Appellee Kim Ho Ma response in opposition to emergency motion staying further action [3768342-1] served on 10/7/99 (MOATT) [99-35976] (ft) [99-35976]
	* * * * *
10/22/99	Filed order (J.C. WALLACE, Edward LEAVY,): Aplts' emergency motion for a stay pending appeal is denied. Petitioner shall be released subject to appropriate conditions before 5:00 p.m. on Monday 10/25/99. (faxed to panel by N. Tompkins) [99-35976] (ft) [99-35976]

DATE	ENTRY
	* * * * *
10/25/99	Filed order (James R. Browning, J. C. WALLACE,): Respondent's emerg motion to stay petitioner's release pending the filing and consideration of an emerg motion for stay in the U.S. Sup Ct is denied. (phoned by N.Tompkins) [99-35976] (ft) [99-35976]
10/25/99	Filed Appellant INS in 99-35976, Appellant Janet Reno in 99-35976, Appellant Richard C. Smith in 99-35976 emergency motion for a stay of the court's release order pending the filing of an emergency stay motion with the U.S. Sup Court and pending the circuit Justice's consideration of that motion; served on 10/25/99 (MOATT) (ft) [99-35976]
	* * * * *
11/29/99	Filed original and 15 copies Appellant INS in 99-35976, Appellant Janet Reno in 99-35976, Appellant Richard C. Smith in 99-35976 opening brief (Informal: n) 53 pages and five excerpts of record in 2 volumes; served on 11/26/99 [99-35976] (ft) [99-35976]

DATE	ENTRY
	* * * * *
12/30/99	Filed Law Professors in 99-35976's motion to become amicus curiae in support of Aple. (PANEL); served on 12/30/99 [99-35976] (sf) [99-35976]
12/30/99	Received Amicus Law Professors in 99-35976's brief in 15 copies of 24 pages; deficient: motion pending to become amicus; served on NO POS. (PANEL) [99-35976] (sf) [99-35976]
1/3/00	Received orig. 15 copies Kim Ho Ma in 99-35976's brief of 76 pages; served on 12/27/99 deficient: oversized, motion & brief to PANEL [99-35976] (ft) [99-35976]
1/3/00	Filed Kim Ho Ma in 99-35976 motion to file oversized brief [99-35976] served on 12/27/99 [3821219] (brief & motion to panel) (ft) [99-35976]

DATE	ENTRY
1/3/00	Received Amicus National Association in 99-35976's brief in 15 copies of 29 pages; deficient: motion pending to become amicus; served on 12/30/99 Notified counsel. (PANEL) [99-35976] response to brief deficiency notice due 1/18/00; (sf) [99-35976]
1/3/00	Filed Amicus National Association in 99-35976's motion to become amicus curiae. (PANEL) [99-35976] served on 12/30/99 (sf) [99-35976]
1/3/00	Filed Human Rights Watch's motion to become amicus curiae. (PANEL); served on 12/30/99 [99-35976] (sf) [99-35976]
1/3/00	Received Amicus Human Rights Watch in 99-35976's brief in 15 copies of 29 pages; deficient: motion pending to become amicus; served on 12/30/99 Notified counsel. [99-35976] (sf) [99-35976]
1/3/00	Received Amicus ACLUF in 99-35976's brief in 15 copies of 30 pages; deficient: motion pending to Panel w/brief; served on 1/3/00 [99-35976] (ft) [99-35976]

DATE	ENTRY
1/3/00	Filed Amicus ACLUF motion for leave to file brief Amici Curiae of ACLUF; [99-35976] served on 1/3/00 [PANEL] (ft) [99-35976]
1/5/00	Filed Amicus FPD in 99-35976's motion for leave to file amicus curiae brief pursuant to Rule 29 FRAP; [99-35976] served on 12/30/99 [3821922] (PANEL) (ft) [99-35976]
1/5/00	Received Immigrants Rights Project's brief in 15 copies of 26 pages; deficient: motion to panel w/ brief; served on 1/3/00 [99-35976] (ft) [99-35976]
1/5/00	Filed Amicus Immigrants Rights in 99-35976's motion for leave to file proposed brief as amici curiae; and to file exhibits to proposed brief; [99-35976] served on 1/3/00 [Panel with brief] (ft) [99-35976]
	* * * * *
1/6/00	Received Petitioner's additional citations. (Panel) [99-35976] (hj) [99-35976]

DATE	ENTRY
1/12/00	Filed order (Deputy Clerk: GB) Petitioner's motion to file an oversize brief is granted. Petitioner's brief is ordered filed. The caption in the above case should be corrected to reflect the respondent as "Reno" in place of "INS." (phoned counsel; faxed to Panel) [99-35976] (hj) [99-35976]
1/12/00	Filed order (Deputy Clerk: GB) The motions of amici curiae Federal Public Defenders, Law Professors, National Association of Criminal Defense Lawyers, and Human Rights watch, et al. are hereby granted. The briefs received January 3, 2000 are ordered filed. The INS is hereby given fourteen days from the date of this order within which to respond. The INS' brief shall not exceed thirty pages in length. (phoned counsel; faxed to panel) [3821367-1] [3821342-1] [3821380-1] [3821922-1] [99-35976] (hj) [99-35976]
1/12/00	Filed original and 15 copies of National Association of Criminal Defense Lawyers 99- 35976's brief of 29 pages; served on 12/30/99. [99-35976] (hj) [99-35976]

DATE	ENTRY
1/12/00	Filed original and 15 copies Human Rights Watch, et al brief of 29 pages; served on 12/30/99. [99-35976] (hj) [99-35976]
1/12/00	Filed original and 15 copies appellee Kim Ho Ma in 99-35976's 76 pages brief w/ supplemental excerpts in 2 vols; served on 12/27/99 (Panel) [99-35976] (hj) [99-35976]
1/12/00	Filed original and 15 copies Law Professors in 99-35976's brief of 24 pages; served on 12/30/99. (PANEL) [99-35976] (hj) [99-35976]
1/12/00	Filed original and 15 copies of FPD's brief of 21 pages; served on 12/30/99. (PANEL-RECORDS) [99-35976] (hj) [99-35976]
	* * * * *
1/18/00	Filed original and 15 copies Respondents-Appellant's 99-35976 reply brief, (Informal: no) 30 pages; served on 1/10/00. (PANEL) [99-35976] (hj) [99-35976]

DATE	ENTRY
1/19/00	Filed order (Deputy Clerk: GB) The Motion filed by Attorney Jayashri Srikantiah to file an amici curiae brief on behalf of the ACLU-IRP, ACLU-WA, and NWIRP, is DENIED. The motion filed by Attorney Frank M. Tse to file an amici curiae brief on behalf of the organizations listed in his motion and in the proposed amici curiae brief, is GRANTED and that brief is ordered filed. Within fourteen (14) days of the filing of this order, the appellants may respond, in not to exceed thirty (30) pages, to the amici curiae brief filed by attorney Tse. (phoned counsel; faxed to panel) [99-35976] (hj) [99-35976]
1/19/00	Filed original and 15 copies's The Southeast Asia Resource Action Center, Immigration Rights and The Mount Carmel Cambodian Center et al., brief of 26 pages; served on 1/3/00. [99-35976] (hj) [99-35976]
	* * * * *
1/31/00	Received Appellant INS et al., brief in 15 copies 39 pages (Informal: no) deficient-motion pending: notified counsel. Served on 1/28/00. (sent Fed. Ex to PANEL) [99-35976] (hj) [99-35976]

DATE	ENTRY
2/2/00	Received FPD additional citations (PANEL) [99-35976] (hj) [99-35976]
	* * * * *
2/4/00	Filed original and 15 copies aplts' brief in reply to be the briefs of amici curiae of 39-pgs. (Informal: no) (PREVS RECVD) (See ct's order filed 2/4/00) [99-35976] (rc) [99-35976]
2/7/00	Received FPD in 99-35976 additional citations. (faxed to PANEL) [99-35976] (hj) [99-35976]
2/14/00	ARGUED AND SUBMITTED TO Stephen R. REINHARDT, David R. THOMPSON, Thomas G. NELSON [99-35976] (jmk) [99-35976]
2/29/00	FILED, AS OF , CERTIFIED RECORD ON APPEAL IN 1 RTs (orig) [99-35976] (mu) [99-35976]
3/21/00	Received Oil's additional citations. (PANEL) [99-35976] (hj) [99-35976]
3/30/00	Received Kim Ho Ma additional citations; served on 3/29/00. ("faxed" PANEL) [99-35976] (dl) [99-35976]

DATE	ENTRY
4/10/00	FILED OPINION: AFFIRMED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Stephen R. REINHARDT, author; David R. THOMPSON; Thomas G. NELSON) FILED AND ENTERED JUDGMENT. [99-35976] (rc) [99-35976]
4/21/00	[3896937] Filed original and 50 copies aplts' petition for rehearing with suggestion for rehearing en banc of 15-pgs; served on 4/21/00. (PANEL AND ALL ACTIVE JUDGES) [99-35976] (rc) [99-35976]
4/21/00	Filed aplt's mtn to expedite consideration of petition for rehearing and rehearing en banc and for vacatur of the panel's decision; served on 4/21/00. (PANEL) [99-35976] [3896944] [99-35976] (rc) [99-35976]
4/27/00	Filed order (Stephen Reinhardt, David R. THOMPSON, Thomas G. NELSON) The Government's motion to expedite is GRANTED. Appellee is directed to file a response, of 15 pages or less, to the Petition for Rehearing En Banc no later than seven days from the date of this order. (Phoned parties, Faxed panel 4:50 pm) [99-35976] (ca) [99-35976]

DATE	ENTRY
5/2/00	Filed Washington Legal, and Allied Educational mtn for leave to file brief as amici curiae in support of petition of respondents-aplts for expedited rehearing and rehearing en banc; served on 4/28/00. (PANEL ONLY) [3903956] [99-35976] (rc) [99-35976]
5/2/00	Received original and 50 copies, Amicus Washington Legal in 99-35976, Amicus Allied Educational in 99-35976's brief in support of petition of respondents-aplts for expedited rehearing and rehearing en banc of 8-pgs; served on 4/28/00; deficient: mtn pending with PANEL to become amicus. (PANEL ONLY) [99-35976] (rc) [99-35976]
5/4/00	Filed original and 50 copies of aple's response to aplts' petition for expedited rehearing and rehearing en banc of 15-pgs; served on 5/3/00. (PANEL AND ALL ACTIVE JUDGES) [3896937-1] [99-35976] (rc) [99-35976]

DATE	ENTRY
5/12/00	Filed Appellant's motion for leave to file Reply to petitioner's response to respondents' petition for expedited rehearing and rehearing en banc. (Panel) [99-35976] served on 5/11/00 [3909000] [99-35976] (kc) [99-35976]
5/12/00	Received Appellant's reply to petitioner's response to respondent's petition for expedited rehearing and rehearing en banc; served on 5/11/00. (Panel) [99-35976] (kc) [99-35976]
5/16/00	Filed Petitioner-Appellee's response to respondent-appellants motion for leave to file reply to petitioner-appellee's response to respondent-appellant's petition for expedited rehearing and rehearing en banc; served on 5/15/00. (PANEL) (ca) [99-35976]
5/19/00	Filed order (Stephen R. REINHARDT, David R. THOMPSON, Thomas G. NELSON,): The Attorney General's motion for leave to file a reply to the Petitioner's response to the Attorney General's petition for expedited rehearing and rehearing en banc is hereby denied. [99-35976] (ft) [99-35976]

DATE	ENTRY
5/31/00	Received certificate of record. [99-35976] (wp) [99-35976]
6/2/00	Filed order (Stephen R. REINHARDT, David R. THOMPSON, Thomas G. NELSON) The panel has voted to deny the petition for rehearing and petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges is favor of en banc consideration. The petition for rehearing and the petition for rehearing en banv are DENIED. [99-35976] (ca) [99-35976]
6/12/00	MANDATE ISSUED [99-35976] (rc) [99-35976]
7/11/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 00-38. filed on 7/5/00. [99-35976] (ca) [99-35976]

DATE	ENTRY
10/16/00	Received letter from the Supreme Court dated 10/10/00 re: the ct today entered the following order. The mtn of the Washington Legal Foundation, et al. for leave to file a brief as amicus curiae is GRANTED. The mtn of respondent Kim Ho Ma for leave to proceed ifp is GRANTED. The petition for a writ of cert. is GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument. (FAXED TO PANEL) [99-35976] (rc) [99-35976]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

File No.: A 27 365 395

IN THE MATTER OF
KIM HO MA, RESPONDENT

ORDER RE
REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(02)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)] - aggravated felony

APPLICATION: Respondent's eligibility to apply for political asylum or withholding of deportation

IN BEHALF OF RESPONDENT:	IN BEHALF OF INS:
Nicholas Marchi, Esq. 1301 Fifth Avenue, Ste. 2804 Seattle, WA 98101	Gregory Fehlings, Esq. Deputy District Counsel P.O. Box 3324 Seattle, WA 98114

ORDER OF THE IMMIGRATION JUDGE

Respondent was admitted to the United States at Seattle, Washington on or about April 26, 1985 as a refugee. His status was adjusted to that of a lawful

permanent resident as of April 26, 1985. (Exhibit 1) The Immigration and Naturalization Service (hereinafter "INS") issued a Notice to Appear (hereinafter "NTA") on July 3, 1997, charging Respondent in Removal proceedings pursuant to Section 237(a)(02)(A)(iii), with aggravated felony. (Exhibit 1)

On August 21, 1997, respondent, through counsel requested that the Court permit him to file for asylum or withholding of deportation. The Court opines that respondent is ineligible for the relief, however, has granted respondent's counsel until September 10, 1997 to file any additional documents or briefs. The INS was granted until September 16, 1997, to file a responsive brief. Respondent has yet to answer to the allegations and charges.

On September 4, 1997, respondent filed a Memorandum Defining 'Danger to Society' and Request for Relief. (Exhibit 2) On September 10, 1996, INS filed its memorandum contending that respondent is statutorily ineligible for a grant of asylum or withholding of deportation, because of his conviction for a particularly serious crime.

On March 1, 1996, the respondent was convicted in the State of Washington, for the offense of "Manslaughter in the First Degree." Respondent argues that he is eligible for withholding of deportation, despite his conviction, as respondent can demonstrate that he has rehabilitated and does not pose a threat to the community. Respondent was sentenced to 38 months in confinement. (Exhibit 1)

Based upon respondent's admissions as to the allegations in the NTA and the Additional Charges of Deportability, as well as respondent's conceding to his removability, and the Judgment and Sentence submitted by the INS (Exhibit 2), I find that removability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966). The Respondent failed to designate a country of removability, should that become necessary, therefore, this Court designates Cambodia, since that is the country of respondent's birth and nativity. The only issue before this Court is whether respondent is eligible for asylum and/or withholding of deportation.

Respondent contends that his conviction is an aggravated felony, but he is not a danger to the community. Respondent contends that he is eligible for asylum, because he has rehabilitated and does not pose a threat to the community. These arguments are without merit.

STATEMENT OF LAW

This case is similar to a recent case decided July 29, 1997, *In re L-S-J-*, Interim Decision #3322, (BIA 1997) wherein the Board of Immigration Appeals held that robbery with a gun is an aggravated felony and a particularly serious crime.

In re L-S-J-, *supra*, the applicant is excludable under sections 212(a)(2)(A)(i)(I), (A)(i)(II), and (7)(A)(i)(I), of the Immigration and Nationality Act, 8 U.S.C. {{1182(a)(2)(A)(i)(II), (A)(i)(II), and (7)(A)(i)(II) (1994). In that case, applicant's applications for asylum and withholding of deportation to Haiti under sections 208

and 243(h) of the Act, 8 U.S.C. {{1158 and 1253(h) (1994) were pretermitted. Applicant was ordered excluded and deported from the United States.

Respondent is a 20-year old native and citizen of Cambodia. The record establishes that the applicant was convicted on March 1, 1996, of Manslaughter in the First Degree and sentenced to 38 months in prison. (Exhibit 1)

According to the Amended Information filed October 31, 1995, respondent and two other Asian males, on April 23, 1995, with premeditated intent to cause the death of another person did cause the death of Oun Roo Chhay, a human being, who died on or about April 23, 1995. (Exhibit 2) Although respondent was at that time 17 years old, he was ordered to be tried as an adult. Respondent was found guilty after trial. Respondent and two other Asian males were involved in shooting at the victim, which subsequently lead to the victim's death.

Respondent was involved in gang activities. The victim was a member of the OLB (Oriental Lazy Boys), whereas respondent was a member of the LAB (Local Asian Boys). According to the Certification for Determination of Probable Cause (Exhibit 2), the victim was in a parking lot while respondent and the two other Asian males crept towards the victim and opened fire in the direction of the victim. Thus, this was a premeditated and planned killing.

There is no evidence that respondent has rehabilitated. According to the Defense Recommendation in the Defendant's Presentence Report, it is disclosed that

respondent should not have been tried as an adult. There is nothing in the report indicating that respondent has rehabilitated. The report only indicates respondent comes from a very good and responsible family. Accofding to this report, respondent blames his problems on his witnessing of other violence and persecution in his home, Cambodia. The respondent has offered a letter from family members desiring to reunite with him. No letters from any probation officer have been presented. Even if, assuming arguendo, that respondent rehabilitated, his crime is a particularly serious crime and makes him ineligible for withholding of deportation or asylum.

The respondent's crime is now considered an aggravated felony under the revised definition of section 101(a)(43)(F) of the Act, because he has committed a crime of violence for which the term of imprisonment is at least 1 year.

Section 321(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ (IIRIRA) (to be codified at 8 U.S.C. { 1101(a)(43)(F) of the Act). *See generally United States v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991) (defining a crime of violence). This revised definition applies to the pending case.

Section 321(c) of the IIRIRA, 110 Stat at ____; *see also Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992); *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993), *modified*, *Matter of C-*, 20

I&N Dec. 529 (BIA 1992). Under section 208(d) of the Act (now sections 208(b)(2)(A)(ii) and (B)(i) of the Act pursuant to section 604(a) of the IIRIRA, 110 Stat. at ____ (to be codified at 8 U.S.C. {{ 1158(b)(20(A)(ii) and (B)(i) (effective April 1, 1997), the applicant may not apply for or be granted asylum because of his conviction for an aggravated felony. *See Matter of A-A-*, *supra*.

The Immigration and Nationality Act was revised by section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1269 (enacted April 24, 1996) (AEDPA), which states that the Attorney General may determine whether discretion to withhold deportation should be exercised in favor of any alien in order to comply with the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 26.

In the case of an alien convicted of an aggravated felony but not sentenced to at least 5 years in prison, the type of crime and the circumstances should be examined to determine whether the alien committed a particularly serious crime. *See Matter of O-T-M-T-*, Interim Decision 3300 (BIA 1996). Whether a crime is particularly serious depends on the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the alien will be in a danger to the community. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified*, *Matter of C-*, *supra*, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988).

The respondent was sentenced to 36 months in prison; he threatened violence with handgun against a victim who subsequently died from the gunshot wound. This Court concludes that the respondent has been convicted of a particularly serious crime. Therefore, his application for withholding of deportation is pretermitted. *See Matter of D-*, 20 I&N Dec. 827, 828 n.1 (BIA 1994); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986), *modified on other grounds*, *Matter of Gonzalez*, *supra*; *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), *modified on other grounds*, *Matter of Gonzalez*, *supra*.

Respondent is ineligible to apply for asylum, since he has been convicted of an aggravated felony. Respondent is also ineligible for withholding of deportation, since his crime is a particularly serious crime.

ORDER

IT IS ORDERED that respondent's application for asylum and withholding of deportation be pretermitted.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Cambodia on the charges set forth in the Notice to Appear and the Additional Charges of Deportability.

DATE: Sept. 12, 1997

/s/ ANNA HO
ANNA HO
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

File No.: A 27 365 395

IN THE MATTER OF
KIM HO MA, RESPONDENT

ORDER RE
BOND REDETERMINATION

CHARGE: Section 237(a)(02)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)] - aggravated felony

APPLICATION: Bond Redetermination

IN BEHALF OF RESPONDENT:	IN BEHALF OF INS:
Nicholas Marchi, Esq. 1301 Fifth Avenue, Ste. 2804 Seattle, WA 98101	Gregory Fehlings, Esq. Deputy District Counsel P.O. Box 3324 Seattle, WA 98114

ORDER OF THE IMMIGRATION JUDGE

Respondent was admitted to the United States at Seattle, Washington on or about April 26, 1985 as a refugee. His status was adjusted to that of a lawful permanent resident as of April 26, 1985. (Exhibit 1) The Immigration and Naturalization Service (here-

inafter "INS") issued a Notice to Appear (hereinafter "NTA") on July 3, 1997, charging Respondent in Removal proceedings pursuant to Section 237(a)(02)(A)(iii), with aggravated felony. (Exhibit 1)

On August 21, 1997, respondent, through counsel requested that the Court permit him to file for asylum or withholding of deportation. The Court opines that respondent is ineligible for the relief, however, has granted respondent's counsel until September 10, 1997 to file any additional documents or briefs. The INS was granted until September 16, 1997, to file a responsive brief. Respondent has yet to answer to the allegations and charges.

On September 4, 1997, respondent filed a Memorandum Defining 'Danger to Society' and Request for Relief. (Exhibit 2) On September 10, 1996, INS filed its memorandum contending that respondent is statutorily ineligible for a grant of asylum or withholding of deportation, because of his conviction for a particularly serious crime.

On March 1, 1996, the respondent was convicted in the State of Washington, for the offense of "Manslaughter in the First Degree." Respondent argues that he is eligible for withholding of deportation, despite his conviction, as respondent can demonstrate that he has rehabilitated and does not pose a threat to the community. Respondent was sentenced to 38 months in confinement. (Exhibit 1)

Based upon respondent's admissions as to the allegations in the NTA and the Additional Charges of Deportability, as well as respondent's conceding to his

removability, and the Judgment and Sentence submitted by the INS (Exhibit 2), I find that removability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966). The Respondent failed to designate a country of removability, should that become necessary, therefore, this Court designates Cambodia, since that is the country of respondent's birth and nativity.

STATEMENT OF LAW

An alien should not be detained or required to post bond unless there is a finding that he is a threat to the national security or a poor bail risk. *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978); *Matter of Patel*, 15 I&N Dec. 666 (BIA) 1976; *See Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987). In determining the necessity for and the amount of a bond, such factors as a stable employment history, length of residence in the community, the existence of family ties, a record of nonappearance at court proceedings, and previous criminal or immigration law violations are properly considered. *See Matter of Andrade, supra; Matter of Sugay*, 17 I&N 637 (BIA 1981); *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Spiliopoulos, supra; Matter of Patel, supra; Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *See also O'Rouke v. Warden, Metropolitan Correction Center*, 539 F. Supp. 1131 (S.D.N.Y. 1982).

A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation proceedings than one who, based on a criminal record or otherwise, has less potential of being granted further relief. *See Matter of*

Andrade, supra. The mere risk of continued narcotics trafficking constitutes danger to safety of persons in the community. *In re Modesto Adalberto Melo-Pena*, A 36 557 334—Oakdale, Decided February 20, 1997 (BIA).

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Transitional Period Custody Rules under 309(b)(3)(B) are applicable. The Rule states in pertinent part as follows:

"(B) RELEASE. - The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and" (Note: (A)(iii) is aggravated felony)

> (i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings. . . . ."

Therefore, this Court needs to reconsider the Bond in this case, since the respondent is a lawful permanent resident.

ANALYSIS OF FACTS & LAW

In this case, respondent has denied deportability due to the manslaughter in the first degree. The Court has received the certified copies of the judgment and sentence in this matter. The Court has entered an Order of Removal in this case. Specifically, this is a conviction for manslaughter in the first degree, an aggravated felony, and under the Antiterrorism and Effective Death Penalty Act, as well as Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, respondent would not be entitled to any relief.

The Court balanced the charges against respondent with his ties to the community. Respondent has resided in this country as a Lawful Permanent Resident since April 26, 1985, approximately 12 years ago. Respondent has extensive family. Respondent has continuously worked in this country. Although respondent's conviction makes him a danger to the community, respondent is not a flight risk. Due to the nature of respondent's conviction, this Court finds that he would be a danger to the community. Therefore, no amount of bail would be able to guarantee the community's safety.

However, the offense of which he was convicted was manslaughter in the first degree. This Court holds that Manslaughter in the First Degree is a particularly serious crime. Furthermore, respondent would be a danger to the community if he is released. Therefore, bond is denied.

This Court has already ordered that respondent be removed from the United States by a previous order.

ORDER

The respondent shall remain in custody without bond, until he is removed from the United States, as ordered by this Court on September 12, 1997.

DATE: Oct. 7, 1997

/s/ ANNA HO
ANNA HO
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

File No.: A 27 365 395

IN THE MATTER OF
KIM HO MA, RESPONDENT

ORDER RE
BOND REDETERMINATION

CHARGE: Section 237(a)(02)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)] - aggravated felony

APPLICATION: Bond Redetermination

IN BEHALF OF RESPONDENT:

Kaaren L. Barr, Esq.
3811 Eastern Avenue North
Seattle, WA 98103

IN BEHALF OF INS:

Gregory Fehlings, Esq.
Deputy District Counsel
P.O. Box 3324
Seattle, WA 98114

ORDER OF THE IMMIGRATION JUDGE

Respondent was admitted to the United States at Seattle, Washington on or about April 26, 1985 as a refugee. His status was adjusted to that of a lawful

permanent resident as of April 26, 1985. (Exhibit 1) The Immigration and Naturalization Service (hereinafter "INS") issued a Notice to Appear (hereinafter "NTA") on July 3, 1997, charging Respondent in Removal proceedings pursuant to Section 237(a)(02)(A)(iii), with aggravated felony. (Exhibit 1)

On September 26, 1997, the Respondent, through previous counsel, Nicholas Marchi, filed a Motion to Reconsider or Clarify Decision. On October 8, 1997, this Court issued an Order Denying Respondent's Request to Redetermine Bond. In this same Court, this Court found respondent removable as charged in the Notice to Appear. On December 30, 1997, respondent, through new counsel, Kaaren L. Barr, filed a Request for Redetermination of Bond.

On March 1, 1996, the respondent was convicted in the State of Washington, for the offense of "Manslaughter in the First Degree." Respondent argues that he is eligible for withholding of deportation, despite his conviction, as respondent can demonstrate that he has rehabilitated and does not pose a threat to the community. Respondent was sentenced to 38 months in confinement. (Exhibit 1)

Based upon respondent's admissions as to the allegations in the NTA and the Additional Charges of Deportability, as well as respondent's conceding to his removability, and the Judgment and Sentence submitted by the INS (Exhibit 2), I find that removability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966). The Respondent failed to designate a country of removability, should that become necessary, therefore, this

Court designates Cambodia, since that is the country of respondent's birth and nativity.

STATEMENT OF LAW

An alien should not be detained or required to post bond unless there is a finding that he is a threat to the national security or a poor bail risk. *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978); *Matter of Patel*, 15 I&N Dec. 666 (BIA) 1976; *See Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987). In determining the necessity for and the amount of a bond, such factors as a stable employment history, length of residence in the community, the existence of family ties, a record of nonappearance at court proceedings, and previous criminal or immigration law violations are properly considered. *See Matter of Andrade, supra; Matter of Sugay*, 17 I&N 637 (BIA 1981); *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Spiliopoulos, supra; Matter of Patel, supra; Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *See also O'Rouke v. Warden, Metropolitan Correction Center*, 539 F. Supp. 1131 (S.D.N.Y. 1982).

A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation proceedings than one who, based on a criminal record or otherwise, has less potential of being granted further relief. *See Matter of Andrade, supra.* The mere risk of continued narcotics trafficking constitutes danger to safety of persons in the community. *In re Modesto Adalberto Melo-Pena*, A 36 557 334 - Oakdale, Decided February 20, 1997 (BIA).

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Transitional

Period Custody Rules under 309(b)(3)(B) are applicable. The Rule states in pertinent part as follows:

"(B) RELEASE. - The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and" (Note: (A)(iii) is aggravated felony)

> (i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings, ..."

Therefore, this Court needs to reconsider the Bond in this case, since the respondent is a lawful permanent resident.

ANALYSIS OF FACTS & LAW

In this case, respondent has denied removability due to the manslaughter in the first degree. The Court has received the certified copies of the judgment and sentence in this matter. The Court has entered an Order of Removal in this case. Specifically, this is a conviction for manslaughter in the first degree, an aggravated felony, and under the Antiterrorism and Effective Death Penalty Act, as well as Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, respondent would not be entitled to any relief.

Respondent's new counsel, Kaaren L. Barr, submitted additional letter from the respondent and psychological report from the Washington Corrections Center in Shelton, Washington. (Exhibit 2) According to this information, respondent did not admit that he had anything to do with the crime of which he was convicted. According to this report, respondent states,

"There's nothing to talk about. I was charged with it [manslaughter]. I was there. I didn't know what was happening. I didn't have a gun. I didn't have nothing. I didn't know. I didn't say nothing in my trial." Obviously, respondent feels absolutely no remorse for what he has done.

Respondent denies any connection with gang involvement in the beginning of this report (Exhibit 2, Page 9). Later on, however, respondent stated, ". . . . his community is involved in gangs, and *one adapts to it.* [Emphasis added] . . . . one thing led to another the night of the offense . . . ."

The Psychologist, Carla van Dam, PhD, went on to summarize her impression of respondent as follows: "He (Respondent) exhibited little insight, denied any knowledge of the instant offense, and said he was not involved in any gang activity despite information to the contrary."

Respondent also denied that he abused drugs. However, during the evaluation, respondent stated as follows: "there's no past use. I've experiences with it. I don't abuse it." Respondent was drunk the night of the offense and had been using marijuana that same night.

It is more significant from the report of the Psychologist that respondent is a danger to the community. Respondent come from a good family, but respondent strayed from his family and got involved in drugs and gang activity. Respondent refuses to accept responsibility, although in his letter he finally admitted to his involvement in gang activities. Respondent was 17

when he committed the offense and he is now only 20 years old. There is nothing in the respondent's file to indicate that he has rehabilitated.

The Court balanced the charges against respondent with his ties to the community. Respondent has resided in this country as a Lawful Permanent Resident since April 26, 1985, approximately 12 years. Respondent has extensive family. Respondent has continuously worked in this country. Although respondent's conviction makes him a danger to the community, respondent is not a flight risk. Due to the nature of respondent's conviction, this Court finds that he would be a danger to the community. Therefore, no amount of bail would be able to guarantee the community's safety.

However, the offense of which he was convicted was manslaughter in the first degree. This Court holds that Manslaughter in the First Degree is a particularly serious crime. Furthermore, respondent would be a danger to the community if he is released. Therefore, bond is again denied.

This Court has already ordered that respondent be removed from the United States by a previous order.

ORDER

The respondent shall remain in custody without bond, until he is removed from the United States, as previously ordered by this Court.

DATE: Dec. 31, 1997

/s/ ANNA HO
ANNA HO
Immigration Judge

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A27 365 395 - Seattle Date: OCT 26 1998

In re: KIM HO MA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kaaren L. Barr, Esquire
3811 Eastern Avenue North
Seattle, Washington 98103

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—
Convicted of aggravated felony

APPLICATION: Asylum, withholding of removal

In an oral decision rendered on September 12, 1997, an Immigration Judge found the respondent to be subject to removal as charged, pretermitted his application for asylum and withhholding of removal, and

ordered him deported to Cambodia. The appeal will be dismissed.

I. DEPORTABILITY

The respondent, a native and citizen of Cambodia, entered the United States as a refugee in 1985. His status was adjusted to that of a lawful permanent resident as of April 25, 1985.

The Immigration Judge properly admitted into evidence the record of conviction. *Matter of Madrigal*, Interim Decision 3274 (BIA 1996). The Second Amended Information shows that the respondent and three others were charged with murder in the first degree in Count One and murder in the second degree in Count Two in the State of Washington. The Information alleged that they caused the death of another person. The Judgment and Sentence report establishes that on March 1, 1996, in a court of the State of Washington, the respondent was convicted of Count One of manslaughter in the first degree in violation of section 9A.32.060(1) of the Revised Code of Washington. A person is guilty of manslaughter in the first degree under Washington law when he recklessly causes the death of another. The crime constitutes a felony. He was sentenced to confinement for 38 months.

We agree with the Immigration Judge that the respondent's crime constitutes a "crime of violence" under the recently amended definition of an aggravated felon in section 101(a)(43)(F) of the Act. 8 U.S.C. § 1101(a)(43)(F), which applies to this case. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 321, 110

Stat. 3009, 3009-586 ("IIRIRA"); *Matter of Yeung*, Interim Decision 3297 (BIA 1996) (attempted manslaughter is a crime of violence); *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994) (definition of crime of violence). There is no evidence of a direct appeal of the conviction, so it is final for immigration purposes. *Matter of Gabryelsky*, 20 I&N Dec. 750, 752 (BIA 1993).

II. WITHHOLDING OF REMOVAL

The respondent is not eligible for most forms of relief from removal due to his conviction for an aggravated felony after his admission to the United States as a lawful permanent resident. *See* section 208 of the Act as amended by the IIRIRA § 604(a), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1158) (asylum); section 212(h) of the Act as amended by the IIRIRA § 348, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1182) (waiver of inadmissibility); section 240A of the Act as added by the IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229b) (cancellation of removal); section 240B of the Act as added by the IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229(c)) (voluntary departure).

1. Section 241(b)(3) of the Act.

In removal proceedings, section 241(b)(3)(A) of the Act specifies that there shall be a restriction on removal to a country where an alien's life or freedom would be threatened on account of race, religion, nationality, membership in a social group, or political

opinion.[1] Section 241(b)(3)(B) of the Act provides certain exceptions to the restriction. In the instant case, we are concerned with section 241(b)(3)(B)(ii) which states that an alien is ineligible for withholding if, "the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States." The final paragraph of section 241(b)(3)(B) states that:

> For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime. . . .

The final paragraph contains language which was not included in previous versions of the Act. Before interpreting this language, it is helpful to consider the history of the particularly serious crime bar and withholding of deportation.

2. Section 243(h) of the Act.

The statutory provision for withholding of deportation was found at section 243(h) of the Act (previously codified at 8 U.S.C. § 1253(h)).[2] It was initially specified

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[1] This provision was added by section 305(a) of the IIRIRA, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1231(b)(3)(A)).

[2] A more detailed history of section 243(h) of the Act is set forth in *Matter of O-T-M-T-*, Interim Decision 3300, at 9-12 (BIA 1996).

that withholding should be denied to an alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." *See* section 243(h)(2)(B) of the Act.

The Board addressed the question of what would be a "particularly serious crime" in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988). In *Matter of Frentescu*, the Board held that in judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. *See id.* at 247. Further, we stated that crimes against persons are more likely to be categorized as particularly serious, but that there may be instances where crimes (or a crime) against the property will be considered to be particularly serious. *Id.* It was subsequently established that once an alien is found to have committed a particularly serious crime, there is no need for a separate determination to address whether the alien is a danger to the community. *See Matter of K-*, 20 I&N Dec. 418 (BIA 1991), *aff'd Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995); *see also Matter of O-T-M- T-*, Interim Decision 3300, at 11 (BIA 1996).

The Board also determined that certain crimes could be considered per se particularly serious, and therefore once the conviction was established, there was no need to proceed to an individualized examination of the crime. *See Matter of Frentescu, supra*, at 247. *See also*

Hamama v. INS, 78 F.3d 233, 240 (6th Cir. 1996) (recognizing the Board's practice of finding that some crimes are inherently particularly serious); *Ahmetovic v. INS*, 62 F.3d 48, 52 (2d Cir. 1995) (upholding a Board decision which found that first degree manslaughter was an inherently particularly serious crime). However, the Ninth Circuit Court of Appeals questioned this practice in *Beltran-Zavala v. INS*, 912 F.2d 1027 (9th Cir. 1990). In that case, the Court found that section 243(h)(2)(B) of the Act did not erect per se classifications of crimes precluding immigration and nationality benefits, and that the statutory language committed the Board to an analysis of the characteristics and circumstances of the alien's conviction. *See id.* at 1032.

Congress amended section 243(h)(2) of the Act through the Immigration Act of 1990. *See generally Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992). Specifically, a final sentence was added to section 243(h)(2) which stated that aggravated felonies are to be considered particularly serious crimes for the purpose of section 243(h)(2). This addition eliminated the need for an individual analysis of the underlying facts and circumstances in any case which the conviction was for an aggravated felony. *See Matter of C-, supra, (modifying Matter of Frentescu* and its progeny in light of statutory amendment); *see also Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 (9th Cir. 1993) (stating that statutory amendment effectively overruled *Beltran-Zavala v. INS, supra*).

The next major change in the withholding law occurred with the passage of section 413(f) of the Anti-terrorism and Effective Death Penalty Act of 1996,

Pub. L. No. 104-132, 110 Stat. 1214 (enacted April 24, 1996). The Board considered the effects of this provision on the aggravated felony bar in *Matter of O-T-M-T-, supra*. We concluded that an alien who has been convicted of an aggravated felony or felonies, and sentenced to at least 5 years of incarceration, is conclusively barred from withholding of deportation. However, an alien who was convicted of an aggravated felony or felonies, and sentenced to an aggregate of less than 5 years of incarceration, would be subject to a rebuttable presumption that he or she has been convicted of a particularly serious crime which would bar eligibility from withholding. The holding in *Matter of O-T-M-T-*, was intended to apply to cases which were initiated before April 1, 1997, and were not controlled by IIRIRA.

3. Section 241(b)(3)(B) of the Act

We now address the contents of current section 241(b)(3)(B)(ii) of the Act in conjunction with the final paragraph of section 241(b)(3)(B) of the Act. The plain language of the first sentence of the final paragraph makes it clear that an alien who has been convicted of an aggravated felony (or felonies), and sentenced to at least 5 years, is barred from withholding of removal. This creates an absolute bar. Therefore, once the aggravated felony conviction and length of sentence are found to trigger the bar, no further analysis of the conviction is necessary.

This leaves the question of what standards should be used for aliens, such as the respondent, who have been convicted of an aggravated felony (or felonies), and have been sentenced to less than 5 years. We find that

the *Frentescu* factors are still a viable framework for evaluating whether a crime is "particularly serious." We therefore will employ them in this case where a determination must be made as to the nature of the crime for the purpose of section 241(b)(3)(B) of the Act. This inquiry does not involve an examination of the respondent's family or community ties, or the risk of persecution in the alien's native country. *See Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987). Further, we do not engage in a retrial of the alien's criminal case or go behind the record of conviction to redetermine the alien's innocence or guilt. *See Matter of O-T-M-T-, supra*, at 20. Our review of any testimony or other evidence beyond the official records of conviction will be very limited and will focus on the underlying nature and circumstances of the crime.

4. The Respondent's Conviction

Therefore, the Immigration Judge in this case properly cited *Matter of Frentescu, supra*, and its factors in determining whether the respondent had committed a particularly serious crime. She concluded that the respondent had been convicted of a particularly serious crime because he was sentenced to 36 months in prison and he threatened violence with a handgun against a victim who subsequently died from the gunshot wound.

The respondent contends that the Immigration Judge abused her discretion in holding that the respondent had been convicted of a "particularly serious crime," and thus, pretermitting his application for withholding of removal. Upon consideration of the relevant factors, the Board agrees with the Immigration Judge that the

respondent's conviction is for a particularly serious crime.

Looking first to the statute under which the respondent was convicted to determine the nature of the conviction, the respondent was found guilty as previously noted of first degree manslaughter by recklessly causing the death of another. This offense contrasts with the offense of second degree manslaughter which requires only criminal negligence in causing death. *See* West's RCWA 9A.32.060, 9A.32.070. Therefore, he acted with a higher degree of culpability in causing the death of another even though he committed the crime without specific intent. Furthermore, at the time of the conviction, his offense was classified a Class B felony, the second most serious type of felony out of three categories of felonies under Washington law.[3] The statute under which he was convicted indicates he was convicted of a particularly serious crime.

Looking to the respondent's Judgment and Sentence, we note that the maximum term of punishment provided for the offense was 10 years with a sentencing range applicable to the respondent of 31 to 41 months based on his criminal record of no prior convictions. *See* West's RCWA 9.94A.310, 9.94A.320, 9.94A.360 (sentencing guidelines). We acknowledge that he received less than the one-half of the maximum due to the absence of prior convictions, but we also note that he received almost the maximum sentence that could be

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[3] It is now classified a Class A felony, the most serious felony under Washington law. *See* RCWA 9A.20.10(1)(b) (classification); 9A.32.060 (first degree manslaughter); 9.94A.360(2) (indicating severity of categories of felonies).

ordered based on his criminal record, further indicating the seriousness of his crime.

The respondent asserts that he was only 17-years-old at the time of the commission of the crime and that he should have been tried as a juvenile where he would have received a sentence of less than 1 year. However, Washington law mandates 16 and 17-years-old be tried as adults if they committed first degree manslaughter (but not second degree manslaughter) because it is considered a serious violent offense. *See* West's RCWA 9.94A.030(31) (definition of serious violent offense); 13.04.030(e)(v)(A) (juvenile court jurisdiction). The State requirement that he be tried as an adult further indicates the particular seriousness of his crime.

The respondent further contends that the Immigration Judge committed error by considering facts contained in the documents charging the respondent with first degree murder as an adult rather than considering those facts contained in the documents relating to his conviction for first degree manslaughter. The respondent is referring to Second Amended Information and to the Certification For Determination of Probable Cause.

We find consideration of these documents by the Immigration Judge was appropriate in this case in determining the underlying circumstances of the respondent's crime. When the Judgment and Sentence and the Second Amended Information are considered together, they establish that the jury found him guilty under Count 1 of the lesser included crime of first degree manslaughter rather than first degree murder. The Immigration Judge was not prejudiced by her

awareness that he had been charged with a much more serious homicide. In addition, he did not challenge, either during the proceedings or on appeal, the essential facts recited in the probable cause affidavit. The probable cause affidavit is detailed in nature and sworn to by the prosecuting attorney. Moreover, the facts alleged in the probable cause affidavit are not inconsistent with his conviction for the less serious crime of first degree manslaughter. It was reasonable for the Immigration Judge to consider the probable cause affidavit in determining the underlying circumstances of the crime.

Considering the probable cause affidavit in the light most favorable to the respondent, it indicates that he was a part of a group of five gang members that ambushed and shot a fellow gang member who subsequently died. Even if he was not one of the two shooters, the nature of the conviction, the severity of the sentence, and the description of the crime establish that he was part of a group that planned to assault the victim with handguns. The jury found him to be culpable for the victim's death as the result of the ambush even if he did not pull the trigger or intend the victim to die. His conviction and sentence to confinement for more than 3 years reflects the seriousness of his participation in the commission of this violent crime. Crimes against persons are more likely to be categorized as particularly serious crimes. *Matter of Frentescu, supra.* Considering the totality of the circumstances of the crime, we agree with the Immigration Judge that his participation in a gang related violent ambush resulting in the death of victim constitutes a particularly serious crime and bars him from applying for withholding of removal. *Cf. Matter of L-S-J-,*

Interim Decision 3322 (BIA 1997) (alien convicted of armed robbery); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986) (alien convicted of armed robbery).

The respondent contends that the Immigration Judge erred when she pretermitted his application for withholding of removal without making a specific finding that he is both convicted of a particularly serious crime and he is presently a danger to the community as required by the statute. However, as previously noted, a particularly serious crime is one that by its nature represents a danger to the community. *See Urbina-Mauricio v. INS, supra; Matter of K-, supra.*

The respondent contends that his constitutional right to due process was violated when he was ordered removed without an opportunity for relief from removal for having been convicted of a crime committed prior to his 18th birthday. We do not have the authority to consider constitutional challenges to the laws we administer. *See Matter of C-*, 20 I&N 529 (BIA 1992); *Matter of Anselmo*, 20 I&N Dec. 25, 30 (BIA 1989). Furthermore, we find that the Immigration Judge did not deny him a meaningful opportunity to be heard. *See Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995) (the Board has authority to fix administratively correctable errors even when those errors are failures to follow due process).

In light of the foregoing, we enter the following order.

ORDER: The appeal is dismissed.

/s/ PAUL W. SCHMIDT
FOR THE BOARD

Notification of Review of Detention Status
At Seattle, WA

To: Kim Ho Ma

File: A27 365 395

You have been held in detention while the Immigration and Naturalization Service (INS) made arrangement for your deportation.

The law allows that INS keep you in detention until your deportation is carried out (8 CFR 241.4). However, if it appears that INS will encounter delays in making arrangements for your deportation that law also says that the District Director may allow your release at his discretion. Before he will consider your release he must be satisfied of two things. Those are

- That you will **not** pose a danger to the community if you are released, and
- That you **will** appear for all future proceedings, including an order to report back to this Service for deportation once arrangements are finalized.

In reaching a decision about those two things he must consider at least the following factors:

- The nature and seriousness of your criminal convictions;
- Other criminal history;
- Sentence(s) imposed and time actually served;
- History of failures to appear for court (defaults);
- Probation history;
- Disciplinary problems while incarcerated;

- Evidence of rehabilitative effort or recidivism;
- Equities in the United States; and
- Prior immigration violations and history.

As a part of this process you may present evidence proving that you will not be a danger to the community, and that you will appear as ordered in any future proceedings. If you are a criminal alien that evidence must be clear and convincing. If you have no criminal background the evidence must simply be satisfactory to the District Director.

An officer will meet with you soon to allow you the opportunity to make any oral statements you wish. Any evidence you wish to present must be in writing and submitted to that officer.

Provided to the alien by (**hand**) (institution mail).

/s/ M. MELENDEZ — 4/13/99
Officer Signature — Date

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C 99-0151WD

KIM HO MA, PLAINTIFF

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT

[Filed: Apr. 23, 1999]

AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2241

1. **Name and location of place of confinement:**[1]

King County Correctional Facility, Regional Justice Center Kent, 620 West James Street, Kent, Washington 98032, pursuant to a contractual arrangement with petitioner's custodian, the INS District Director at Seattle, Washington.

2. **Name and location of court causing confinement:**

INS District Director, Seattle, Washington

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[1] This petition substantially conforms to the Model Forms for petitions under 28 U.S.C. § 2241.

3. **Case Name and Number:** A 27 365 395

4. **Date of judgment and conviction:**

Placed in INS detention on June 6, 1997; petitioner was ordered deported in September of 1997; petitioner appealed his deportation order to the BIA, which denied his appeal in October of 1998.

5. **Sentencing Date:** N/A

6. **Sentencing:** N/A

7. **Sentencing Judge:** N/A

8. **Nature of offense or offenses for which you were convicted:** N/A

9. **What was your plea:** N/A

10. **Kind of trial:** N/A

11. **Did you testify at trial?** N/A

12. **Did you appeal from the judgment of conviction or sentence?** No.

13. **If you did appeal, list the court to which you appealed:**

(a) Name of Court:

(b) Result:

(c) Date of Result:

14. **Did you seek any further review?** N/A

15. **List the court(s) to which you sought further review?**

(a) Name of Court:

(b) Nature of Review:

(c) Result:

(a) Name of Court:

(b) Nature of Review:

(c) Result:

16. **Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to your confinement in any court, state or federal?**

Subsequent to this petition, petitioner filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. §2241 (Case No. C99-0337C, U.S. Dist. Ct., W.D. Wa.)

17. **GROUNDS FOR RELIEF:**

A. Petitioner's indefinite detention by respondent INS is in violation of his rights to procedural and substantive due process, as guaranteed by the Fifth Amendment to the United States Constitution.

B. Because petitioner is seeking relief related only to his custody status, which is not inconsistent with an order of deportation, exhaustion of administrative remedies, if any, is not required.

C. Petitioner's detention is unconstitutional, because he is not a flight risk, and he does not present a danger to society.

17a. Facts in support of grounds for relief as set forth in §17:

A. Petitioner is subject to an order of deportation, *not* incarceration, however he is being deprived of personal liberty indefinitely because Cambodia, his native country, refuses to accept his return.

B. Petitioner has asked the Immigration Judge for release to community supervision, and has been denied bail three times. Petitioner went on a hunger strike to bring attention to his unlawful detention, but the INS did nothing.

Petitioner should not be required to exhaust administrative remedies (if any such remedies are actually available) relating to the underlying order for deportation in order to be released from his indefinite incarceration, which violates his constitutional rights.

C. Petitioner has many family members who would support him if he were released. He has a good job waiting for him and a place to live in a safe environment. Petitioner would make a positive contribution to society if he were released.

Although the INS is holding petitioner because it believes he is a danger to the community or a flight risk, or both, it is not giving him any access to educational, rehabilitative or vocational programs. Petitioner is therefore not being given any chance to prove his rehabilitation.

D. Petitioner filed the instant *pro se* petition on February 2, 1999. The Federal Public Defender's Office was appointed to represent Petitioner on April 22, 1999. As of today's date, counsel for Petitioner has not received the Administrative File (A-file) from Respondent.

Petitioner's claim that he is being detained unconstitutionally is the same claim raised by over fifty other petitioners presently seeking relief in this district. By Order of the District Court for the Western District of Washington, Petitioner's case will be heard before a "panel" of all five district court judges along with four other "lead" cases. Counsel for Petitioner intends to perform a comprehensive review of the Petitioner's A-file, as well as independently investigate the individual circumstances of Petitioner's claims, which Petitioner anticipates will disclose additional facts supporting the above-stated claims.

The Petitioner reserves the right to assert additional facts once Respondent provides counsel with his INS administrative file, and in rebuttal to facts alleged by the INS in its brief in this proceeding.

18. Do you have any petition or appeal now pending in any court or administrative body as to the claims raised above? No.

19. Have you exhausted your administrative remedies with respect to the claims raised above?

See 17(D), above.

20. State the administrative remedies that you pursued?

(a) Nature of Review:

(b) Result:

(a) Nature of Review:

(b) Result:

(a) Nature of Review:

(b) Result:

21. Give the name and addresses, if known, of each attorney who represented you in the following stages of the underlying judgment:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At change of plea: N/A

(d) At trial: N/A

(e) At sentencing: N/A

(f) On Appeal: N/A

(g) In any post-conviction proceedings: N/A

(h) On appeal from any adverse ruling in post conviction proceedings: N/A

(i) Other:

(j) Other:

22. Do you have any future sentence to serve after you complete the sentence imposed by the underlying judgment in your case? No.

23. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information? Yes.

PRAYER FOR RELIEF

Based upon the illegal and unconstitutional actions listed above, Petitioner requests that the Court grant his petition and direct respondent to release him from custody, as well as any other relief to which he may be entitled in this proceeding under 28 U.S.C. § 2241.

On information and belief, the foregoing information is true and correct.

Dated: April 23, 1999.

Respectfully submitted,

/s/ JAY STANSELL
JAY STANSELL
Assistant Federal Public Defender
Attorney for Petitioner Kim Ho Ma
Federal Public Defender
1111 Third Avenue, Suite 1100
Seattle, WA 98101
(206) 553-1100

[seal omitted]

U.S. Department of Justice
Immigration and Naturalization Service
Western Region, Seattle Division

Office of Detention & Deportation
815 Airport Way South
Seattle, WA 98134
(206) 553-5948/7915
Fax: (206) 553-2387

May 5, 1999

Consulate General of Cambodia
4500 16th Street NW
Washington, DC 20011

Dear Consul General:

Kim Ho MA, A27 365 395, a native and citizen of Cambodia, is in the custody of the Immigration and Naturalization Service. He is under removal proceedings, and has been ordered removed from the United States by the Immigration Judge. Therefore, it is respectfully requested that a travel document be issued to facilitate his return to Cambodia.

The attached are documents that your office requires. Your expeditious handling of this matter of mutual interest is greatly appreciated. We have included a return FedEx airbill and envelop for your convenience.

If additional information is needed, please call either Deportation Officer Michael A. Melendez or Richard McNees, at the numbers given above.

Thank you for your assistance in this matter.

Sincerely,

/s/ GEORGE L. MORONES
GEORGE L. MORONES
Assistant District Director,
Detention & Deportation

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Civil Action No. C 99-151L
INS # A27 365 395

KIM HO MA, PETITIONER,

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES; THE IMMIGRATION AND
NATURALIZATION SERVICE; AND,
RICHARD C. SMITH, DISTRICT DIRECTOR OF THE INS,
SEATTLE DISTRICT OFFICE, RESPONDENT

DECLARATION OF PATRICK O'REILLY

1. I am a Staff Officer, assigned to the Immigration and Naturalization Service, Field Operations Division, United States Department of Justice, Washington, D.C. I have been employed by the Service since 1971.

2. My present duties include development of policy and regulations relating to the enforcement of final orders of deportation and the removal of criminal aliens from the United States. In my current position I am personally familiar with inter- and intra- governmental efforts that have been undertaken to establish a procedure for the repatriation of persons who are citizens and nationals of the Cambodia and have been ordered excluded, deported, or removed from the United States.

3. I am aware that the petitioner in this matter has a petition for a writ of habeas corpus pending before the United States District Court for the Western District of Washington. This declaration will provide the District Court with evidence setting forth the current status of efforts to establish a protocol for obtaining travel documents for citizens of Cambodia who have been deported from the United States.

4. I am aware that the Service is detaining criminal aliens from Cambodia pending receipt of travel documents, and that the government of Cambodia has not honored requests from the Service for travel documents in most such cases. The Service is actively seeking to resolve this problem and establish a procedure to obtain travel documents for persons from Cambodia. In the meantime, all requests for travel documents are handled on a case-by-case basis through the Embassy's Consular Section.

5. The process of establishing such procedures for the return of persons who are citizens and nationals of Cambodia, however, is a sensitive and complicated matter for both governments. Cambodia, for example, like other countries, regulates travel and emigration of its citizens. It has, in recent years, cooperated with other governments with respect to both the resettlement abroad and the return of Cambodian nationals, e.g., the Orderly Departure Program (ODP).

6. It is the position of the United States that other countries, including Cambodia are required as a matter of international law to accept and repatriate their citizens who are excluded or expelled from this country

and who have not obtained another nationality in the interim.

7. Pending establishment of procedures for repatriation of nationals of Cambodia, criminal aliens can be considered for release from Service custody in accordance with the Immigration and Nationality Act (INA) and the regulations promulgated thereunder if the country of removal refuses repatriation.

8. Further, when an alien's removal from the United States has been delayed by the failure of the alien's own government to issue travel documents, such alien may seek admission to a third country. Additional removal countries are discussed generally in Section 241(b) of the INA.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C.

Dated: 5/20/99 /s/ PATRICK O'REILLY
PATRICK O'REILLY,
Staff Officer
Immigration and Naturalization Service
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-98-1299 WBS JFM
INS # A25197145
DJ# 39-11E-252

CHEA PHOENG, PETITIONER

v.

MR. THOMAS SCHILTGEN, DISTRICT DIRECTOR,
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE, RESPONDENT

DECLARATION OF PATRICK O'REILLY

1. I am a Staff Officer, assigned to the Immigration and Naturalization Service, Field Operations Division, United States Department of Justice, Washington, D.C. I have been employed by the Service since 1971.

2. My present duties include development of policy and regulations relating to the enforcement of final orders of deportation and the removal of criminal aliens from the United States. In my current position I am personally familiar with inter-and intra- governmental efforts that have been undertaken to establish a procedure for the repatriation of persons who are citizens and nationals of the Cambodia and have been ordered excluded, deported, or removed from the United States.

3. I am aware that the petitioner in this matter has a petition for a writ of habeas corpus pending before the United States District Court for the Eastern District of

California. This declaration will provide the District Court with evidence setting forth the current status of efforts to establish a protocol for obtaining travel documents for citizens of Cambodia who have been deported from the United States.

4. I am aware that the Service is detaining criminal aliens from Cambodia pending receipt of travel documents, and that the government of Cambodia has not honored requests from the Service for travel documents. The Service is actively seeking to resolve this problem and establish a procedure to obtain travel documents for persons from Cambodia.

5. The process of establishing such procedures for the return of persons who are citizens and nationals of Cambodia, however, is a sensitive and complicated matter for both governments. Cambodia, for example, like other countries, regulates travel and emigration of its citizens. It has in recent years cooperated with other governments with respect to both the resettlement abroad and the return of Cambodian nationals, e.g., the Orderly Departure Program (ODP).

6. It is the position of the United States that other countries, including Cambodia, are required as a matter of international law to accept and repatriate their citizens who are excluded or expelled from this country and who have not obtained another nationality in the interim. The Department of Justice and Department of State are developing a strategy to strengthen the cooperation with the government of Cambodia which would be similar to the draft agreement currently being developed for the Republic of Vietnam.

7. Pending establishment of procedures for repatriation and nationals of Cambodia, criminal aliens can be considered for release from Service custody in accordance with the Immigration and Nationality Act (INA) and the regulations promulgated thereunder if the country of removal refuses repatriation.

8. Further, when an alien's removal from the United States has been delayed by the failure of the alien's own government to issue travel documents, such alien may seek admission to a third country. Additional removal countries are discussed generally in Section 241(b) of the INA.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C.

Dated: 11/18/98

/s/ PATRICK O'REILLY
PATRICK O'REILLY,
Staff Officer
Immigration and
Naturalization Service
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-98-1299 WBS

CHEA PHOENG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

DEPOSITION OF PATRICK O'REILLY

[July 12, 1999]

REPORTED BY: CHERREE P. GAGE
CSR No. 11108, RPR

* * * * *

[7] MR. BRODERICK: I would like to put on the record a stipulation of attorneys regarding objections and preservation of objections.

MR. KLINE: All objections are preserved for any future proceedings, save those as to form.

MR. BRODERICK: We agree. Now if you could administer the oath.

(Witness sworn.)

EXAMINATION BY MR. BRODERICK

Q Mr. O'Reilly, I'd like to start with Cambodia. Exhibit 1 is your November 18th, 1998, declaration filed in the case of Chea Phoeng versus the INS. In that declaration you state that the INS is, quote, actively, close quote, seeking to establish a procedure to obtain travel documents from Cambodia.

I wonder if you could tell us, what specifically was the INS doing? What were you referring to in that sentence? It's actually the last sentence of paragraph four.

A What the agency was—what the Immigration Service was attempting to do was to finalize our draft agreement that we had prepared for the Vietnam, Cambodian, Laotian countries, and we were processing it through internally in the Immigration Service at the time.

[8]

Q Now, with respect to Cambodia, was there a separate draft agreement from the one for Vietnam?

A No. The draft agreement for Vietnam started out to be a draft agreement for Vietnam. But as the Cambodian and Laotian government expressed a need for a draft agreement, we made a generic agreement, basically, which we figured would be utilized at a later date when we approached the various governments. This was back at the planning stage in 1996.

Q Now, with respect to some other acts, as of November 18th, 1998, had a representative of the INS met with the Cambodian Ambassador?

A No, they had not.

Q Had the United States been invited by Cambodia to submit a proposed repatriation agreement?

A Through correspondence the Cambodia Consulate, the Embassy in Washington, D.C., has expressed a need for a return agreement.

Q Now, I want to get on that. In fact, they had said —what you're referring to, I think, is—let's look at Exhibit 3, second paragraph. First line says, "The government of the United States of America and the Royal Government of Cambodia have not yet negotiated an agreement to cover the deportation and [9] return of former Cambodian citizens to Cambodia." This is signed by the 2nd Secretary and Consul. Is that what you're referring to?

A I'm referring to letters similar to this. This is more or less a format type of letter sent out by the Cambodian government when it responds to various inquiries to get travel documents. They always—the format usually states we haven't negotiated an agreement as of yet and they would not be issuing travel documents.

Q I'm not referring in my question to the fact there is no agreement, as this letter seems to indicate. What I'm asking is if the Cambodian Embassy has actually invited or requested the United States to submit a proposed repatriation agreement similar to what the Vietnam Ambassador did?

MR. KLINE: Object as to form. There's lack of foundation for the question.

Q BY MR. BRODERICK: Did you understand the question?

A I understood the question.

Q Okay. Go ahead and answer.

A I understood the question to say has there been a formal letter to the United States Immigration Service requesting negotiations for—is this what you're [10] asking?

Q Or oral. Oral or in writing.

A In writing, yes. This is a request telling us that they are waiting for us to negotiate an agreement. It's not a direct request to the Commissioner of the Immigration Service. This is a request saying we're waiting for the United States government to sit down with us and negotiate an agreement. This is what this paragraph tells me.

Q Let's look at Exhibit 15, for example. This will be 15. If we turn to page three of Exhibit 15, the second line—I'm sorry. The last sentence of paragraph number seven. It goes, "In May of this year representatives of the Service," meaning the INS, "met with SRV Ambassador Le Bang, who invited the United States to submit a proposed repatriation agreement for possible negotiation between the two states." Did this happen with Cambodia?

A No, it did not.

Q Now, has the State Department been asked to prepare a draft agreement for Cambodia?

A By who?

Q By the INS.

A No.

Q Do you know if accompanying Circular 175 [11] authority—do you know what that is?

A Yes.

Q Do you know if a memo with accompanying Circular 175 authority was prepared by the State Department?

A I became aware last month at a meeting with staff officials at the State Department, Department of Justice and the INS that this was in the process of being done as soon as—the draft agreement was being signed off by the Commissioner, the DAG's office and forwarded to the State Department.

Q There has been no 175 authority memo prepared as of this date to Cambodia?

MR. KLINE: I object.

Q BY MR. BRODERICK: Is it yes or no?

A To my knowledge, it has not been prepared.

Q Do you know if a draft agreement has been cleared within the State Department?

A What type of draft?

Q Draft agreement with respect to Cambodia and the repatriation of former Cambodian nationals?

A A draft agreement? We submitted a draft agreement to them. They have sent it back to us throughout this whole process over the last few years, and they now—at our meeting that we had last month, we agreed on the wording in the draft agreement. And [12] this is why it's at a point now we're waiting for the appropriate officials to sign off on it so the preparations can be made for negotiations.

Q Now, is this the draft agreement that will be presented to the Republic of Vietnam?

A It's the draft agreement which we're requesting to be presented to the Republic of Vietnam, Laotian government and the Cambodia government.

Q Do you know if the draft agreement that you're referring to has been cleared with other interested federal agencies besides INS?

A It has been cleared with the INS, Department of State and we're cleared in the sense of a verbal—once it's signed off by the DAG's office, we will sign off on it here. And those are the only three agencies that have been involved in it.

Q So it was never shown to the Department of International Trade or Department of Commerce?

A There was not a requirement for that.

Q Do you know if it was shown to them?

A No.

Q And you say the draft agreement has been presented to the INS General Counsel's Office?

A It's been signed off. Last time I checked, which left a week ago, it was signed off by the General [13] Counsel. I'll repeat myself. The meeting we had in June at the State Department, everybody was in agreement to the wording, it was a matter of tweaking a few things and having it sent over and signed off by the Commissioner.

My understanding is it's at the Executive Secretary's office and it will be sent to the Deputy Commissioner and the Commissioner, signed, and then to the DAG's for signature and Department of State.

Q Do you know if the supporting memorandum that accompanied the draft agreement has been signed off by the General Counsel's office?

A Yes, I do.

Q When was that?

A I became aware of it last month at the meeting.

Q What date last month?

A Mid-June. I mean, I don't recall the exact date.

Q That's okay. That's okay. Do you know if any State Department employee has requested the necessary negotiating authority from the Secretary of State? This is, again, Circular 175 authority.

A I was advised at the meeting last month by the legal counsel of the State Department that once the document was hand delivered to them with the appropriate signatures on them, that they would [14] request this.

Q So the answer is no State Department employee has requested the necessary negotiating authority from the Secretary State?

MR. KLINE: Object to form of question. That isn't what he said.

Q BY MR. BRODERICK: Can you answer the question?

A Once the draft agreement is received by the legal counsel, the State Department—from the DAG's office, it will be presented.

Q To the Secretary of State's office—Department of State? Excuse me.

A Yes.

Q So I will ask you again, has any – to your knowledge, has any State Department employee requested the necessary negotiating authority from the Secretary of State?

A They have been unable to because they haven't received the draft yet.

Q So is the answer to my question no?

A No, not at this time.

Q No, it's not, or, no, they haven't requested it?

A No, I have no knowledge of them requesting it.

Q So has the negotiating draft been submitted to Cambodia?

[15]

A No, it hasn't.

Q Do you know if Cambodia has reviewed any of the negotiating draft?

A To my knowledge, no.

Q Do you know if Cambodia has proposed time and venue for actual negotiations?

A No.

Q And I take it no agreement has been accepted by both sides, Cambodia and the United States?

A The United States has a draft agreement they're ready to go forward with.

Q Has any final agreement been accepted by the United States?

A As soon as the Commissioner and the DAG's office sign off on it, it will be a final agreement on the Department of State.

Q Has Cambodia accepted any final agreement?

A Cambodia hasn't been given the agreement. We haven't gone into negotiations yet.

Q Has the United States signed any agreement with Cambodia?

A No, they have not.

Q Has any agreement been implemented with Cambodia?

A No, it has not.

MR. KLINE: Object as to the question. Vague and [16] ambiguous as to what agreement you're speaking of there.

MR. BRODERICK: I'm talking about the agreement—

Q You understand the agreement I'm talking about?

A I'm hoping it's the agreement I've been working on.

Q The one you referred to in a draft agreement?

A Correct.

MR. KLINE: Please don't hope and don't assume.

Q BY MR. BRODERICK: You signed a declaration May 20th, 1999. That's Exhibit No. 2. That also indicates that the INS is actively seeking to obtain travel documents from Cambodia. Was there anything different or anything new that happened between November 1998 and May 20th, 1999. Anything different than what you just explained?

A No.

Q Today's July the 12th, 1999. Again, is there anything different between now and what you just explained, except for meeting in June?

MR. KLINE: Objection. He explained more than just meeting in June.

Q BY MR. BRODERICK: Well, I just want to know if there's anything else besides the meeting in June?

[17]

A As far as I know, the draft agreement has not been—has not left the INS as of yet. It's at the Exec Sec's office waiting to be given to the Deputy Commissioner.

Q Now, turning back to Exhibit No. 1, page two, paragraph five. You indicate in the last sentence of that paragraph, you mention the Orderly Departure Program, ODP, and you indicate that Cambodia has "cooperated with other governments with respect to both the resettlement abroad and the return of Cambodian nationals."

By "other governments" did you mean not the United States government?

A Yes, sir.

Q In your paragraph six of that same declaration you state that the Department of Justice—again, last sentence, "The Department of Justice and Department of State are," quote, "developing a strategy to strengthen the cooperation with the government of Cambodia."

Prior to November 18th, 1998, when was the last meeting on this issue between the Department of Justice and Department of State?

A There were—

MR. KLINE: If you know.

[18] THE WITNESS: I don't know the exact dates. There were many follow-up meetings and meetings with the Department of State, with the Office of International Affairs, INS General Counsel regarding the whole process.

Q BY MR. BRODERICK: How many is "many," less than five?

A I'd say more than five.

Q Less than ten?

A Yes.

Q When was the last one in relation to November that you can recall?

MR. KLINE: Objection. Vague and ambiguous question.

Q BY MR. BRODERICK: When was the last one prior to November 18th, 1998?

A I don't recall.

Q Between November 1998 and may the 20th 1999, how many meetings were there?

A There were no meetings.

Q In between May '99 and today, July 12th, 1999, how many meetings?

A There was one meeting.

Q And that was in June?

A That's correct.

[19]

Q You indicated that there were many, quote, follow-up meetings. What were you referring to when you said "follow-up"?

A CC mails—well, all right. Meetings. If we submitted a—if there was some question on the draft, if they wanted additional information or clarification or they felt this was no need to be in the draft agreement, those were the follow-up meetings we discussed on issues like that.

A lot of times they would be telephonic, face-to-face, writing things, stuff like that. It involved the General Counsel's office, it involved Department of State, it involved International Affairs, it involved the Program and Field Operations. You had many different entities involved in the various meetings.

Q Okay. If we look at Exhibit 1, paragraph six, the last sentence again, "The Department of Justice and Department of State are developing a strategy to strengthen the cooperation with the government of Cambodia which would be similar to the draft agreement currently being developed for the Republic of Vietnam."

Now, in that paragraph you don't indicate that the draft agreement would refer to all three [20] countries; is that correct?

A No, I don't.

Q When did that change?

A When did it change?

Q When did the draft agreement become a draft agreement for the all three countries?

A It was part of a strategy that we had spoken about through the years of using this. We had found out that the various countries involved here wanted agreements, wanted removal type of return agreements set up with their country. This was always in the back of our mind when we were developing this whole thing.

Q Who's "we"?

A The INS Field Operations.

Q And who is that specifically in terms of persons?

A Myself, Robert Obenshane (phonetic) and possibly one or two other persons involved. But myself and Mr. Obenshane were the two ones that wrote the agreement.

Q Now, if you look at that sentence and then turn to Exhibit No. 2 and look at, again, paragraph six, same paragraph, that sentence is not there in paragraph six. Do you know why?

MR. KLINE: Do you understand the question?

THE WITNESS: No.

[21]

Q BY MR. BRODERICK: Well, let me make it clear. Paragraph six of Exhibit 1, the last sentence is there. Do you see it?

A Okay. Yeah.

Q Paragraph six, Exhibit No. 2, it's not there. Why?

A Because we had already developed a strategy. The draft was already finalized. It had been sent to the General Counsel's office. As far as my involvement in the whole process was done with, and at that point in time in '98 through '99 I was just making call ups of about every 60 days to find if out what the status was of the actual document itself and how it was moving along through the General Counsel's chain of management. And—I mean, the strategy was done, as far as I was concerned. We weren't developing it anymore.

Q So as of May 20th, 1999, it was done?

A May or June, yeah. Around May.

Q Well, the declaration was May 20th, 1999.

A Then it was May.

Q Any earlier than that?

A No.

Q Now, again, Exhibit 2, paragraph number four, it states, "All requests for travel documents are handled [22] on a case-by-case basis through the Embassy's Consular Section." I apologize for the copy on—

A That's fine.

Q That's the only copy we have.

A I wrote it, so I remember what it says.

Q Do you mean handled by the INS on a case-by-case basis, is that what you were referring to?

A I'll give you a little background on it. The actual process itself when you receive a final order on a case, what you'll do is the district office responsible for the case, the deportation section of the investigation, depending on who was handling it, would request a travel document through the local consulate. Due to the fact these three countries were small and didn't have local consulate sections, they would request through the embassy. They would send a presentation request to issue a travel document for this person from the district level, and that's what I was referring to when I wrote that.

Q So we are referring to handled by the INS on a case-by-case basis?

A Yes.

Q Now if you could look at Exhibit No. 3 again, that's a letter from the Cambodian Embassy. And I think you indicated previously that you have seen [23] several letters like this?

A Uh-huh.

Q Is that correct?

A Yes. I've seen letters that have the same substance.

Q Could you read aloud the first line of the second paragraph.

A "The government of the United States of America and the Royal Government of Cambodia have not yet negotiated an ag. eement to cover the deportation and return of former Cambodian citizens to Cambodia."

Q Now, as you understand it, does that appear to be a policy statement applicable to all cases?

A It's a statement. I don't know if it's a policy statement.

Q Does it appear that the Cambodian to you—does it appear to you—from the statement does it appear that the Cambodian government is reviewing each case on a case-by-case basis?

A Not to me. It appears to me that they are blanketly denying the request for travel documents until there is actually an agreement negotiated between the two governments. That's my interpretation of this, my personal intrepretation.

Q Right. If a request were made for travel [24] documents in an individual case and it received a response such as this in writing, would that request and the response go in the individual detainee's INS A file?

A Yes.

Q So if no request or response was made –

MR. KLINE: Excuse us.

MR. BRODERICK: Let the record indicate that Richard Cohen, also staff attorney for the Federal Defender's Office of the Eastern District of California, just walked in. Richard, you can figure out who everybody is later.

Q BY MR. BRODERICK: So if the request or the response is not in an individual's A file, does that

indicate that either no request or no response was received?

MR. KLINE: Object to the question. "No request or response was received"?

Q BY MR. BRODERICK: Sorry. No request was made or no response received?

A I can't answer that honestly. I don't know.

Q Do you know if they're supposed to go in the A file if they're made or received?

A I would—from my experience of working in various field offices, I would place that in the [24] particular A file. Okay? If it's not in there, to me, if I was reviewing the file, I would request whether there was a request made, but I can't say whether it was or not. I don't know what the—maybe one district might be doing it differently. I have no idea.

Q Are you aware of any situations in your personal experience in which request was made in writing or a response received in writing and not placed in the A file?

A To my knowledge, no.

Q Now, in Exhibit No. 2, returning back to Exhibit 2, paragraph four, again, this is a declaration of Patrick O'Reilly made on May the 20th, 1999, and filed in the Western District of Washington.

If you look at paragraph number four and the first sentence, probably about the third line, you state that "The government of Cambodia has not honored

requests from the Service for travel documents in," quote, "most such cases."

Now, are you aware of Cambodia honoring any requests from the INS for travel documents for detained aliens?

A From the United States?

Q From the United States? Detained aliens from [26] the United States.

A Yes.

Q How many?

A One that I'm personally aware of.

Q When was that?

A 1997

Q And who was that individual?

A I don't have the name. I have the copy of it at my office.

Q And did that person have either exit or passport papers from the Cambodian government? Is it he or she?

A It was a family, as a matter of fact.

Q Now, we have a declaration of you regarding a Laotian family.

A I also had a Cambodian family, too.

Q How many members of the family?

A I think it was a man, wife and child, two children.

Q And did this family exit Cambodia with either a passport or—

A They had a passport.

Q So they had a Cambodian passport?

A They had a travel document, correct.

Q So are you aware of any other cases in which [27] someone who did not have a travel document, where the Cambodian government honored a request?

A To my knowledge of any cases that were brought forth to me for assistance, no.

Q And you're the person in charge of this?

A In charge of what?

Q You're the person who develops policy and regulations relating to the enforcement of final orders of deportation and the removal of criminal aliens from the United States?

A Yes, I develop policies. I don't handle cases nationwide.

Q So why did you use the word "most" in this declaration?

A "Most" where?

Q That line, "in most such cases."

A Well, "most" is the fact that they honored one request that I was aware of, that's why I used the word. It wasn't they weren't honoring any.

Q But you indicated that these people that were from Cambodia had travel documents?

A I just indicated that to you now, they had expired travel documents. They had overstayed their visas. They were illegal in the country.

Q This refers to honoring requests from the Service [28] for travel documents in most such cases. Is there a difference?

A I made a request to the—I was representing the Service when I made the request of the Cambodian Embassy to renew the expired passport for these people, and I'm the one that received it.

Q Why didn't you indicate in your declaration that it involved one family?

A I just didn't. I didn't. It was one family that I personally was aware of that I was personally involved with.

Q Why didn't you indicate in your declaration that this family had actually had proper travel documents to leave Cambodia.

A I didn't see it—I didn't see a need for it.

Q In your declaration with respect to Laos, and I believe it is Exhibit No. 8 and exhibit—Exhibit No. 8, yes. I'm sorry. Exhibit No. 7. I'm sorry, Exhibit No. 7.

Exhibit No. 7, page two, paragraph four. You indicate in the last sentence that, "The Laotian government has issued documents in the last two years for a Laotian family who left the People's Republic of Laos with an exit visa and passport, but it has not issued travel documents for those who left without a [29] passport and exit visas."

You did not state those with respect to Cambodia, did you?

A No, I did not. It wasn't on my mind. I remembered it was done when I did this document. When I did the document on the Cambodia, it was done on 5-20-99. A couple years passed and it wasn't on my mind, so I didn't put it in the declaration. Had I remembered this, I would have placed it in the declaration.

Q So when you completed the declaration on Exhibit 7, 4-28-99, did that refresh your recollection of what happened with the Cambodian individuals? In other words, did you remember the Cambodia case at that point?

A No.

Q So when did you first remember this about the Cambodian family?

A Upon reviewing files that I have in my office to see what the status was of various cases that have been processed through there.

Q And what date was that?

A That I reviewed the files?

Q Uh-huh.

A I would say during the time I was making out the [30] declaration.

MR. KLINE: I'm going to object to this line of questioning. The whole premise is he says on paragraph four in Exhibit 2 that "The government of Cambodia has not honored requests from the Service for travel documents in most such cases."

Somehow or other Mr. Broderick has taken "most such cases," compared it to a Laotian declaration and wondered why it is the declarant has managed to leave out many further thoughts in this particular paragraph. And I think that the question is unfair and argumentative.

MR. BRODERICK: Objection noted.

Q Did you think that in using the word "most" someone could be misled into thinking that there was more than one request?

A Definitely not.

Q But let's go back to Exhibit No. 1 and Exhibit No. 2. You indicate—take your pick. Let's take Exhibit No. 1.

A Sure. You take your pick.

Q And that will go to paragraph eight. You indicate that "Such alien may seek admission to a third country." Are you aware of any third countries who have accepted criminal INS aliens from deportation [31] from Cambodia?

A No, I am not.

Q Why did you put it in there?

A It's an option to the alien at the removal hearing. The alien can request to go a third country, a former residence or possible citizenship. That's an option open to the alien. That's why I placed it in there.

Q Is there anything that the alien can do, other than indicate a country to obtain travel documents from a third nation, that the United States government cannot do?

A I don't understand your question.

Q In other words, the Service is attempting to get agreement to get travel documents from Cambodia. And the Service, according to you, has been meeting and has developed a strategy, correct?

A Yes.

Q And the Service hopes to put together a draft agreement that will eventually be presented to the Cambodia government, correct?

A The Service has a draft agreement that they hope to present to the Cambodian government, correct.

Q Is there anything that the individual alien can do to get these travel documents that the United [32] States government is not or cannot do?

A Yes.

Q What?

A Apply for it.

Q And who does he apply to?

A The Cambodian Embassy in Washington, D.C.

Q And if he applies to the Cambodian Embassy and receives a response similar to Exhibit No. 3, is there anything else that that individual can do?

MR. KLINE: Objection. Calls for speculation. And lack of foundation that any alien has applied to the Cambodian Embassy and received a response similar to Exhibit No. 3.

MR. BRODERICK: Fine.

Q Do you understand my question? Is there anything else the alien can do if they get a response like this?

MR. KLINE: Same objection.

MR. BRODERICK: Let me make it easier.

Q In light of the response, particularly the first sentence to the paragraph, is there anything the alien can do?

A Reapply.

Q Anything else?

MR. KLINE: I still object to the question. I [33] mean, there's no showing that any individual alien—

THE WITNESS: Reapply.

MR. KLINE: Stop.—that any individual alien has ever applied to the Cambodian government and gotten a letter back that says "The government of the United States of America and the Royal Government of Cambodia have not yet negotiated an agreement to cover the deportation and return of former Cambodian citizens to Cambodia."

MR. BRODERICK: Objection noted.

Q Anything else they can do?

A Yes. Reapply.

Q Anything else?

A Reapply.

Q So the only thing they can continue to do is reapply.

A Yes.

Q Are you aware of any change in the Cambodian government's position in the last 10 years?

A I have never really looked into it as far as what their policies are as far as have they changed in—as far as what I know personally is that we have requested travel documents for individual cases through district offices, they have turned us down based on the fact they want a draft agreement.

[34] Any other policy that they have or any other type of way of negotiating or way of getting travel documents I am unaware of.

Q So based upon Exhibit No. 3 and the statement in that letter, as well as the policy that you've indicated, would it be futile for an alien to apply individually to the Embassy?

A I don't see why they wouldn't.

Q My question is, do you think it would be futile? Do you know what that means?

A No. Explain it to me.

Q Would it be ineffective? Would they be unable to obtain travel documents by simply applying to the Embassy?

A I don't know.

Q Do you have an opinion?

A No.

Q Under oath, no opinion?

A I don't have an opinion. I think if they apply for a document, they should try.

Q You have no opinion about whether or not they would receive a response similar in kind to Exhibit No. 3.

A I can only—yeah, I would have an opinion.

MR. KLINE: Don't speculate.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-98-1552 LKK JFM P

HUNG VAN LE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

DECLARATION OF JAMES G. HERGEN

I, JAMES G. HERGEN, declare as follows:

1. I am the Assistant Legal Adviser for East Asian and Pacific Affairs, Office of the Legal Adviser, United States Department of State, Washington, D.C. 20520, a position that I have held since 1992. Prior to that time, I occupied the position of Assistant Legal Adviser for Consular Affairs, since 1983. From 1974-1982, I was a Trial Attorney in the Office of Foreign Litigation, Civil Division, United States Department of Justice. I am a member in good standing of the District of Columbia Bar.

2. My duties as Assistant Legal Adviser for Consular Affairs related in substantial part to the enforcement and administration of the immigration and nationality laws of the United States, including the admission of

aliens to and, as appropriate, their removal from the United States. Such duties included occasional communications with foreign states, including the Socialist Republic of Vietnam ("SRV") to persuade them to accept back their nationals or former nationals.

3. My current duties include responsibility for diverse legal issues that affect U.S. relations with East Asia (including Vietnam, Laos, and Cambodia) and the South Pacific region. I am personally familiar with, and have been a participant in, many of the efforts that have been undertaken by the U.S. government over the past decade to encourage the SRV to accept back its nationals who have been ordered excluded, deported, or removed from the U.S.

4. I am aware that the petitioner in this matter has filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California. The purpose of this declaration is to provide the court with information regarding the current status of U.S. efforts to negotiate an agreement with the SRV for the repatriation of its nationals and former nationals who have been so ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar litigation.)

5. This declaration is based solely and exclusively upon information that is known to me in the course and scope of the performance of my official duties.

6. Shortly after assuming my current position in the early 1990's, I visited the SRV Mission to the United Nations ("U.N.") in New York, inter alia to attempt to persuade the SRV to accept back certain of its deportable nationals. The SRV's Permanent Representative to the U.N. ("Permrep") listened politely to our presentation (which was made on behalf of the Immigration and Naturalization Service, "INS"), but expressed regret that there was not very much he could do in the absence of relations between the U.S. and Vietnam. (Although I did not attend subsequent meetings with the SRV Permrep, I recall having "cleared" several sets of "talking points" on the repatriation subject for subsequent visits to the SRV Permrep by other Department of State officials.)

7. I was personally and substantially involved in the planning and execution of the U.S. decisions to end the U.S. trade embargo against the SRV (February 1994); to establish "liaison offices" (January 1995); and, to establish diplomatic relations with the SRV (July 12, 1995).

8. My current recollection is that, shortly after the opening of "liaison offices" and the establishment of diplomatic relations, the Department of State invited the SRV Embassy to send representatives to attend a meeting at the Department of State with officials of the INS for the purpose of exploring options for the repatriation of SRV nationals. According to my current recollection, I made a brief presentation to the SRV officials concerning state obligations under international law with respect to their nationals, and INS made a presentation regarding the numbers of SRV nationals whom it wished the SRV to accept, and the modalities with respect to such returns. The SRV officials listened politely, but were noncommittal, and explained that they would have to transmit the INS's information to the appropriate authorities in Hanoi for further analy-

sis. I believe that there may have been at least one follow-up meeting some time later, but that this meeting was also inconclusive. I am aware that in 1997 the Department of State had consulted with SRV Charge Thong concerning this subject, and that Charge Thong had expressed a willingness to negotiate some form of accord with the U.S. There may well also have been other formal and informal discussions with the SRV on this subject concerning which I was unaware. I can also say with a high degree of confidence that the SRV was aware that this was a serious bilateral issue for the U.S., and that we incorporated the subject into our ongoing, official discussions with Vietnamese authorities between 1993 and 1998.

9. According to my current recollection, INS representatives approached the Department of State at some point in late 1997 or early 1998 to request that we again approach the SRV regarding the repatriation issue. After consulting with the Vietnam Desk, I informed the INS that the Department of State would be happy to comply with their request, and I recommended that we propose to the SRV that our two countries enter a formal international agreement on this subject. In the interests of time however, INS suggested that we first propose to the SRV the negotiation of a working-level memorandum of understanding between INS and the SRV's INS counterpart organization.

10. In compliance with the INS's request, Department of State officers escorted INS representatives to the SRV Embassy in Washington, D.C., on or about April 13, 1998, for the purpose of making their proposal for a memorandum of understanding directly to SRV

Ambassador Le Bang. Ambassador Bang received the INS delegation, listened politely to their proposal, and explained that his country would only consider a more formal international agreement.

11. At the request of the INS, I promptly drafted a proposed U.S.-SRV repatriation agreement for INS consideration (based upon an earlier, INS-drafted version), together with appropriate documentation to obtain negotiating authority under the Case-Zablocki Act, 1 U.S.C. 112(b), and Department of State Circular 175 (11 Foreign Affairs manual Part 720). These materials were circulated for appropriate clearances within the federal interagency process in about June, 1998.

12. Between June, 1998, and this month, there were a number of communications among the Department of State, the Department of Justice, and the INS regarding the proposed agreement with the SRV. On or about July 15, I received final comments and clearances from the Department of Justice and INS, and immediately arranged to have the authorization package transmitted to the Deputy Secretary of State, who approved the negotiation on July 19. In addition to the SRV, the authority also permits the negotiation of similar agreements with Cambodia and Laos, should that be appropriate. (Note: The draft U.S.-SRV agreement and the accompanying authorization documents are classified as national security information, at the "Confidential" level, under sections 1.5(b) and (d) of E.O. No. 12958).

13. Depending upon scheduling considerations for U.S. and SRV officials, and possible consultations with appropriate congressional staff, we currently anticipate presenting the proposed repatriation agreement to the

SRV Embassy in Washington, D.C., within the next thirty (30) days, together with a request to hold initial bilateral negotiations as soon thereafter as may be mutually convenient. Since we now have authority to negotiate similar agreements with Cambodia and Laos, we can initiate initiatives with those states as well as the SRV, and I have recommended that we do so promptly.

14. Because of the very nature of such negotiations, it is not possible to predict when they may conclude. However, I can state that, based upon the fact that the SRV has recently entered into a repatriation agreement with Canada; the general state of U.S.-SRV relations; and, the generally receptive attitude of the SRV officials with whom I have dealt previously on this issue, I am confident of the prospects for successfully negotiating an agreement with the SRV. Nor am I aware of any reasons why we would not be able also successfully to negotiate such agreements with Cambodia and Laos.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information, recollection, and belief.

Executed at Washington, D.C.
July 21, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

KINGDOM OF CAMBODIA

[Seal Omitted]
NATION - RELIGION - KING

ROYAL EMBASSY OF CAMBODIA
TO THE UNITED STATES OF AMERICA
WASHINGTON, D.C.

July 27, 1999

Mr. Jay W. Stansell
Assistant Federal Public Defender
Western District of Washington

Dear Mr. Stansell,

I have the honor to acknowledge receipt of your letter date July 26, 1999, regarding the Travel Document of the former Cambodia citizen to deport from United States to Cambodia. I would like to inform you that the Royal Government of Cambodia has no extradition treaty with the United States. Therefore, subject must be detained under the law of the United States.

Please accept the assurances of my high consideration.

Sincerely,

/s/ NOU HAK
NOU HAK
First Secretary and Consul

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C 99-151-L

KIM HO MA, PETITIONER

v.

JANET RENO; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; AND RICHARD SMITH, RESPONDENTS

AFFIDAVIT OF NUALA NI MHUIRCHEARTAIGH

STATE OF WASHINGTON)
COUNTY OF KING): ss

I, Nuala Ni Mhuircheartaigh, being duly sworn and upon my oath, depose and say:

1. I am currently engaged as the Thomas Addis Emmett International Fellow at the Federal Public Defender's Office in Seattle, WA, where I am assisting Jay Stansell, Assistant Federal Public Defender, and Jennifer Wellman, Staff Attorney, in their representation of Mr. Kim Ho Ma. The statements in this declaration are based on my direct knowledge and a series of telephone conversations with the Consulate General of Cambodia in Washington, D.C.

2. On Wednesday, July 12, 1999, I engaged in a telephone conversation with the Cambodian Consul Mr. Nou Hak at the Consulate General of Cambodia in Washington, D.C. The purpose of this conversation was to ascertain whether any possibility existed of Cambodia issuing travel documentation for Mr. Ma and allowing his deportation to that State.

3. To this end I informed Mr. Hak of the relevant aspects of Mr. Ma's history as revealed by his INS A-file, including but not limited to, the nationality of his parents, his place and date of birth, his criminal conviction while a Permanent Resident of the United States, and the Final Order of Deportation to which he is now subject.

4. Mr. Hak informed me that no possibility existed of issuance of travel documentation to Mr. Ma or any other Cambodian national, because at present, there is no formal deportation agreement between the United States and Cambodia. The Cambodian government has only one international deportation agreement, with Thailand, and as a result, all requests from all other countries for travel documents for Cambodian nationals who have been ordered deported, are refused. Mr. Hak confirmed in this regard, that he was not aware of any successful deportation to Cambodia from the United States.

5. On Thursday, September 9, 1999, I engaged in a follow-up conversation with Mr. Hak concerning the specific case of Mr. Kim Ho Ma. Mr. Hak again confirmed that at present no agreement is in place between the government of Cambodia and the United States, and that as a result, the deportation of Mr. Ma to

Cambodia is at present not possible. Mr. Ma must be processed under United States law, he stated.

6. Mr. Hak also informed me that on Saturday, September 4, 1999, officials of the United States State Department met with officials of the Cambodian Consulate with regard to the State Department's preliminary proposals for a deportation agreement between the two states. Mr. Hak confirmed, however, that the Cambodian Government and Consulate made no input with regard to the proposal in question. Officials of the Consulate, he stated, will now send a report of the meeting and State Department proposals to the Cambodian Government for comment. Mr. Hak stated, however, that he cannot foretell how much time will pass before the Cambodian Government will pass preliminary comment on the United States State Department proposals. He further stated that he cannot foresee when any possible agreement will be concluded, if indeed such an agreement is ever reached. No definite time can be stated, he emphasized, when a deportation agreement between the United States and Cambodia may be completed.

7. The situation thus remains as heretofore, Mr. Hak repeated: at present, no possibility of authorization of removal of Mr. Ma from the United States to Cambodia exists, and further, he cannot predict when, if ever, such authorization will be forthcoming.

The foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 9th day of September, 1999.

/s/ NUALI NI MHUIRCHEARTAIGH
NUALI NI MHUIRCHEARTAIGH

SUBSCRIBED and SWORN to before me this 9th day of September, 1999.

/s/ KAREN A. CRAWFORD
Printed Name: KAREN A. CRAWFORD
NOTARY PUBLIC in and for the State of Washington, residing at Isoaquat
My appointment expires 7/19/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETITION FOR WRIT OF HABEAS CORPUS
No. CIV S-99-0302-LKK

LE THAN GIANG, PETITIONER,

V.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

DECLARATION OF JAMES G. HERGEN

I, JAMES G. HERGEN, declare as follows:

1. I am the Assistant Legal Adviser for East Asian and Pacific Affairs, Office of the Legal Adviser, United States Department of State, Washington, D.C., 20520, a position that I have held since 1992. Prior to that time, I occupied the position of Assistant Legal Advisor for Consular Affairs, since 1983. From 1974-1982, I was a Trial Attorney in the Office of Foreign Litigation, Civil Division, United States Department of Justice. I am a member in good standing of the District of Columbia Bar.

2. My duties as Assistant Legal Adviser for Consular Affairs related in substantial part to the enforcement and administration of the immigration and nationality laws of the United States, including the admissions of aliens to and, as appropriate, their removal from the

United States. Such duties included occasional communications with foreign states, including the Socialist Republic of Vietnam ("SRV") to persuade them to accept back their nationals or former nationals.

3. My current duties include responsibility for diverse legal issues that affect U.S. relations with East Asia (including Vietnam, Laos, and Cambodia) and the South Pacific region. I am personally familiar with, and have been a participant in, many of the efforts that have been undertaken by the U.S. government over the past decade to encourage the SRV to accept back its nationals who have been ordered excluded, deported, or removed from the U.S.

4. I am aware that the petitioner in this matter has filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California. The purpose of this declaration is to provide the court with information regarding the current status of U.S. efforts to negotiate an agreement with the SRV, Cambodia, and Laos for the repatriation of their nationals and former nationals who have been so ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar litigation.)

5. This declaration is based solely and exclusively upon information that is known to me in the course and scope of the performance of my official duties.

6. Shortly after assuming my current position in the early 1990's, I visited the SRV Mission to the United Nations ("U.N.") in New York, inter alia to attempt to persuade the SRV to accept back certain of its

deportable nationals. The SRV's Permanent Representative to the U.N. ("Permrep") listened politely to our presentation (which was made on behalf of the Immigration and Naturalization Service ("INS")) but expressed regret that there was not very much he could do in the absence of relations between the U.S. and Vietnam. (Although I did not attend subsequent meetings with the SRV Permrep, I recall having "cleared" several sets of "talking points" on the repatriation subject for subsequent visits to the SRV Permrep by other Department of State officials.)

7. I was personally and substantially involved in the planning and execution of the U.S. decisions to end the U.S. trade embargo against the SRV (February 1994); to establish "liaison offices" (January 1995); and, to establish diplomatic relations with the SRV (July 12, 1995).

8. My current recollection is that, shortly after the opening of "liaison offices" and the establishment of diplomatic relations, the Department of State invited the SRV Embassy to send representatives to attend a meeting at the Department of State with officials of the INS for the purpose of exploring options for the repatriation of SRV nationals. According to my current recollection, I made a brief presentation to the SRV officials concerning state obligations under international law with respect to their nationals, and INS made a presentation regarding the numbers of SRV nationals whom it wished the SRV to accept, and the modalities with respect to such returns. The SRV officials listened politely, but were noncommittal, and explained that they would have to transmit the INS's information to the appropriate authorities in Hanoi for

further analysis. I believe that there may have been at least one follow-up meeting some time later, but that this meeting was also inconclusive. I am aware that in 1997 the Department of State had consulted with SRV Chargé Thong concerning this subject, and that Chargé Thong has expressed a willingness to negotiate some form of accord with the U.S. There may well also have been other formal and informal discussions with the SRV on this subject concerning which I was unaware. I can also say with a high degree of confidence that the SRV was aware that this was a serious bilateral issue for the U.S., and that we incorporated the subject into our ongoing, official discussions with Vietnamese authorities between 1993 and the present.

9. According to my current recollection, INS representatives approached the Department of State at some point in late 1997 or early 1998 to request that we again approach the SRV regarding the repatriation issue. After consulting with the Vietnam Desk, I informed the INS that the Department of State would be happy to comply with their request, and I recommended that we propose to the SRV that our two countries enter a formal international agreement on this subject. In the interests of time, however, INS suggested that we first propose to the SRV the negotiation of a working-level memorandum of understanding between the INS and the SRV's INS counterpart organization.

10. In compliance with the INS's request, Department of State officers escorted INS representatives to the SRV Embassy in Washington, D.C., on or about April 13, 1998, for the purpose of making their proposal for a memorandum of understanding directly to SRV Ambassador Le Bang. Ambassador Bang received the

INS delegation, listened politely to their proposal, and explained that his country would only consider a more formal international agreement.

11. At the request of the INS, I promptly drafted a proposed U.S.-SRV repatriation agreement for INS consideration (based upon an earlier, INS-drafted version), together with appropriate documentation to obtain negotiating authority under the Case-Zablocki Act, 1 U.S.C. 112(b), and Department of State Circular 175 (11 Foreign Affairs manual Part 720). These materials were circulated for appropriate clearances within the federal interagency process in about June, 1998.

12. Between June, 1998, and this July, 1999, there were a number of communications among the Department of State, the Department of Justice, and the INS regarding the proposed agreement with the SRV. On or about July 15, 1999, I received final comments and clearances from the Department of Justice and INS, and immediately arranged to have the authorization package transmitted to the Deputy Secretary of State, who, on July 19 approved the opening of formal negotiations with the SRV, Cambodia, and Laos concerning the proposed agreements.

13. On or about August 24, we obtained from the Department's Office of Translation Services translations of the U.S. negotiating draft into the Vietnamese, Khmer, and Laotian languages.

14. On September 1, U.S. representatives (including the undersigned) presented the U.S. negotiating drafts, and accompanying translations, to the Ambassadors of

Laos (Ambassador Vang Rattanavong) and the SRV (Ambassador Le Bang), in Washington, D.C. On September 2, we presented a copy of the negotiating draft, and accompanying Khmer translation, to the Cambodian Chargé (Counselor Tan Vunyaung) in Washington, D.C. In each case, we made an extensive presentation regarding the importance of the issue to the aliens detained in INS custody, as well as to the bilateral relations of the U.S. and the country concerned, and requested the Ambassador (or, in the case of Cambodia, the Chargé) promptly to inform his government of our presentation and to provide us with a preliminary position within 30-60 days. Independently, we have provided copies of the draft agreements to our embassies in Hanoi, Phnom Penh, and Vientiane, and we intend to request each of the three governments to receive a U.S. delegation for preliminary negotiations in November, or as soon thereafter as possible.

15. Because of the very nature of such negotiations, it is not possible to predict when they may conclude. However, I can state that, based upon the fact that the SRV has recently entered into a repatriation agreement with Canada; the general state of U.S.-SRV relations; the fact that the SRV currently accepts at least some of its deportable nationals from Canada, Sweden, and other states; and, the generally receptive attitude of the SRV officials with whom I have dealt previously on this issue, I am confident of the prospects for successfully negotiating an agreement with the SRV. Nor am I aware of any reasons why we would not be able also successfully to negotiate such agreements with Cambodia and Laos.

I declare under penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is true and correct to the best of my information, recollection, and belief.

Executed at Washington, D.C.,
September 15, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

U.S. Department of Justice **Order of Supervision**
Immigration and
Naturalization Service

File No: A27 365 395
Date: October 25, 1999

Name MA, Kim Ho 20702 113 PL S.E.' Kent, WA 98031 ph# (253) 856-188X
On 10/26/1998, you were ordered:

☐ Excluded or deported pursuant to proceedings commenced prior to April 1, 1997.

☒ Removed pursuant to proceedings commenced on or after April 1, 1997.

Because the Service has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under the following conditions:

☒ That you appear in person at the time and place specified, upon each and every request of the Service, for identification and for deportation or removal.

☒ That upon request of the Service, you appear for medical or psychiatric examination at the expense of the United States Government.

☒ That you provide information under oath about nationality, circumstances, habits, associations, and activities and such other information as the Service considers appropriate.

☒ That you do not travel outside Washington State for more than 48 hours without first having notified this Service office of the dates and places of such proposed travel.

☒ That you finish written notice to this Service office of any change of residence or employment within 48 hours of such change.

☒ That you report in person on the 10th day of each month to this Service office at:

US INS 815 Airport Way South, Seattle, WA
3rd floor Deportation Section

unless you are granted written permission to report on another date.

☒ That you assist the Immigration and Naturalization Service in obtaining any necessary travel documents.

☒ Other :

If the 10th day falls on a holiday or weekend, report the next business day

☒ See attached sheet containing other specified conditions (Continue on separate sheet if required)

[photographs fingerprint omitted]

GEORGE L. MORONES
(Signature of INS official)

George L. Morones, ADD/DDP
(Print name and title of INS official)

Alien's Acknowledgment of Conditions of Release under an Order of Supervision

I hereby acknowledge that I have (read) (had interpreted and explained to me in the English language) the contents of this order, a copy of which has been given to me. I understand that failure to comply with the term of this order may subject me to a fine, detention, or prosecution.

[ILLEGIBLE]
(Signature of INS official serving order)

KIM HO MA — 10-25-99
(Signature of INS alien) (Date)

Attachment to Order of Supervision for Kim Ho MA/
A27 365 395
Dated October 25, 1999 at Seattle, WA.

The following conditions are imposed in addition to those listed on the face page of the I220B

- You will report to INS office at:

  815 Airport Way South, Seattle, WA 98134
  Detention and Deportation Section 3rd Floor
  10th day of each month

You will give this document to the person who meets you at the counter. You may also be ordered in writing to report for special interview outside that schedule. At any time you will be expected to answer questions about your employment, activities and associations.

- You will assist the Immigration Service in obtaining a travel document to return to your country by providing any information required, or corresponding or speaking with your consul.

- You will not associate with a gang of any sort, nor will you associate with gang members.

- You will not possess or use illegal drugs, nor will you knowingly associate with anyone who does.

- You will not possess or use any firearm.

You will abide by all laws. If you are arrested for any reason you must report the arrest to a deportation officer within 48 hours of the arrest. You, or someone acting for you, will do so by calling (206) 553-5948 and providing the person who answers with the following information:

- your name and A number;
- the date and time of the arreast;
- the reason you were arrested; and
- the name of the department or agency that arrested you.

Failure to report an arrest within 48 hours may result in your being rearrested by INS and placed back into custody.

If you are arrested an INS officer will contact the department that arrested you and obtain a copy of the arrest report. He may interview the officer who arrested you. He will determine the circumstances of the arrest, then he will present his findings to the Assistant District Director of Detention and Deportation (ADDD). The ADDD will determine if, in his judgment, you have become a threat to public safety or a flight risk. Depending on his findings, he may change the conditions of your supervision, or he may order that you be brought back into INS custody at the earliest possible moment.

- You will immediately surrender to an officer of this Service for deportation upon being ordered to do so.

Any departure from the United States, regardless of purpose of duration, executes your deportation: you will not be allowed to return to this country.

These conditions are in effect as long as you are at large in the United States.

NOTHING FURTHER

GEORGE L. MORONES
George L. Morones
Assistant District Director/
Detention & Deportation

KIM HO MA
Alien—Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C-99-1363R

BUNNY VATH, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL,
ET AL., RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

SUPPLEMENTAL DECLARATION OF
JAMES G. HERGEN

1. This declaration supplements my previous declarations of July 21 and September 15, 1999, in related cases regarding the same issue.

2. As noted in my previous declarations, I have been personally involved in ongoing efforts to encourage the governments of Cambodia, Laos, and Vietnam to accept back their nationals who have been ordered excluded, deported, or removed from the U.S.

3. Today, I was informed that this Honorable Court has granted the petition for writ of habeas corpus filed by Mr. Vath, and has ordered that Mr. Vath be released from immigration custody. In light of

this order, the Department of Justice asked me to provide an urgent update concerning the ongoing diplomatic efforts by the U.S. government to encourage the Royal Government of Cambodia ("RGC") to take back Cambodian nationals who have been ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar pending litigation in the federal courts.)

4. As noted in my declaration of September 15, a high-level delegation of officials from the Department of State, the Immigration and Naturalization Service (INS), and the Department of Justice made an extensive, formal presentation to the Cambodian Charge d'Affairs, Counselor Tan Vunyanug, on September 2, presented him with a draft agreement, and asked him to have his government provide us with a preliminary response to our request for negotiation within 60 days. Independently, we instructed our Embassy in Phnom Penh to make a parallel overture to the RGC in Cambodia.

5. On November 10, the Department of State sent a follow-up cable to our Embassy in Phnom Penh, in which we instructed our Embassy to request the RGC to receive a U.S. delegation as early in the New Year as possible, so that we could begin detailed negotiations with a view towards resolving this in a mutually satisfactory manner. Although the RGC has not yet answered us formally, our Embassy in Phnom Penh has informed us informally that the RGC will presumably be willing to

meet with U.S. negotiators in early 2000, when a U.S. delegation is scheduled to travel to the region for talks with Vietnam and Laos.

6. Moreover, I am particularly encouraged by other positive developments with respect to Cambodia over the past month. On October 21, the Deputy Director of the Department of State's Office of Burma, Cambodia, Laos, Thailand, and Vietnam Affairs (EAP/BCLTV) met with the new Cambodian Ambassador to the U.S., The Honorable Roland Eng, *inter alia* to discuss issues related to the proposed repatriation agreement. Ambassador Eng expressed an exceptionally positive attitude, and undertook to dispatch Cambodian consular officers to interview detainees whom the INS identifies as Cambodian nationals. On November 16, EAP/BCLTV sent Ambassador Eng a list of detained Cambodians, and provided him with the name of an INS contact person who can facilitate such travel to the detainees. This is the first of the three countries to make such an undertaking, and we view this initiative as both a sign of RGC good faith and a significant step forward.

7. While it is extremely difficult to predict the ultimate outcome of such delicate diplomatic negotiations, based on my personal involvement and my various communications with senior U.S. officials, I am increasingly sanguine about the prospects for achieving a mutually satisfactory arrangement on this issue between the U.S. and the RGC.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information and belief.

Executed at Washington, D.C.
November 17, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

No. C 99-1363R

BUNNY VATH, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL,
ET AL., RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

**SUPPLEMENTAL DECLARATION OF
JAMES G. HERGEN**

This declaration supplements my previous declarations of July 21, September 15, and November 17, 1999, in this and related cases regarding the same issue.

1. As noted in my previous declarations, I have been personally involved in ongoing efforts to encourage the governments of Cambodia, Laos, and Vietnam to accept back their nationals who have been ordered excluded, deported, or removed from the U.S.

2. This declaration, which I have prepared at the request of the Department of Justice, provides an update concerning recent developments in the ongoing diplomatic efforts by the U.S. government

to encourage the Royal Government of Cambodia ("RGC") and the Lao People's Democratic Republic ("LPDR") to take back Cambodian and Laotian nationals who have been ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar pending litigation in the federal courts).

3. As noted in my declaration of September 15, a high-level delegation of officials from the Department of State, the Immigration and Naturalization Service (INS), and the Department of Justice made an extensive, formal presentation to the Cambodian Charge d'Affairs, Counselor Tan Vunyanug, on September 2, presented him with a draft agreement, and asked him to have his government provide us with a preliminary response to our request for negotiations within 60 days. On September 1, we made a similar presentation and request to Laotian Ambassador, Vang Rattanavong. Independently, we instructed our Embassies in Phnom Penh and Vientiane to make parallel overtures to the appropriate host country authorities in Cambodia and Laos.

4. On November 10, the Department of State sent a follow-up cable to our Embassies in Phnom Penh and Vientiane, instructing them to request the host governments to receive a U.S. delegation as early in the New Year as possible.

5. In my supplemental declaration of November 17, I also reported concerning several other positive developments that encouraged me in my belief that the RGC will cooperate with the U.S. in achieving a mutually satisfactory resolution to this issue.

6. Shortly after I filed my supplemental declaration of November 17, our Embassies in Phnom Penh and Vientiane reported that both the RGC and the LPDR will likely receive a U.S. delegation early in the New Year, as we have requested. (The Department of State is continuing its efforts to arrange with the Socialist Republic of Vietnam ("SRV") a mutually acceptable date early in the New Year for discussions on this issue. Our objective is to arrange a date with the SRV that will permit the U.S. negotiating team to visit all three countries during a single visit to the region. I shall report to the court regarding the status of these efforts on or before January 11, 2000, as directed in the Court's Order of November 12, 1999, in the case of Thong Vi Duong v. Reno, No. C99-930R (W.D. Wash.).

7. The U.S. considers the foregoing developments to be significant, positive steps in the negotiating process, and as particular signs of sincerity and good faith on the part of the RGC and LPDR.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information and belief.

Executed at Washington, D.C.
November 26, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C 99-1294C

TINH VINH TRUONG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS

AFFIDAVIT OF HEATHER LYNN WINSLOW

STATE OF WASHINGTON COUNTY OF KING: ss

I, Heather Lynn Winslow, being duly sworn and upon my oath, depose and say:

1. I am currently engaged as a Research Attorney at the Federal Public Defender's Office in Seattle, WA, where I am assisting Jay Stansell, Assistant Federal Public Defender, and Jennifer Wellman, Staff Attorney, in their representation of Mr. Tinh Vinh Truong. The statements in this declaration are based on my direct knowledge and conversations with the Embassy and Consulate of Vietnam.

2. On Wednesday, December 1, 1999, I engaged in a telephone conversation with Mr. Ly at the Embassy of Vietnam, in Washington, D.C. The purpose of this conversation was to ascertain whether there was any

possibility that Vietnam would issue travel documentation for Mr. Truong in the foreseeable future.

3. Mr. Ly informed me that there is no possibility that Vietnam will issue travel documents for Mr. Truong, or any other individual ordered deported from the United States, until the two countries reach a formal repatriation agreement.

4. According to Mr. Ly, Vietnam and the United States do not presently have a repatriation agreement under which Vietnam will accept persons ordered deported from the United States. Mr. Ly stated that negotiations between the United States and Vietnam have recently begun, but he is unable to predict when a repatriation agreement may be reached.

5. I asked Mr. Ly whether the recent negotiations between Vietnam and Canada could provide some indication of how long it may take for the United States and Vietnam to reach a similar repatriation agreement. He stated that it could not. According to Mr. Ly, the negotiations for reaching such an agreement involve extended discussions between the two countries, and the process may vary from situation to situation, depending on the particular issues raised by the party countries.

6. Mr. Ly stated that he is aware of the draft repatriation agreement which the United States recently submitted to Vietnam. However, he indicated that after the draft has been presented to the Vietnamese government, there is no way to predict how long it may take for the government to respond. He further stated that no one could now predict the total length of the process because it depends entirely on the number of issues each country raises and how long the respective governments take to respond to the other's issues.

The foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 2nd day of December, 1999.

/s/ HEATHER LYNN WINSLOW
HEATHER LYNN WINSLOW

SUBSCRIBED AND SWORN to before me this 2d day of December, 1999.

/s/ LYNN SHAMULKA
Printed Name: LYNN SHAMULKA
NOTARY PUBLIC in and for the State of Washington, residing at Seattle, WA
My appointment expires 5/19/02

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. CIV-98-1568 DFL JFM P

THAN DUC TRAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

SUPPLEMENTAL DECLARATION OF JAMES G. HERGEN

---

1. This declaration supplements my previous declarations of July 21, September 15, November 17, and 26, 1999 and January 7, 2000, in this and related cases.

2. I have been personally involved in ongoing efforts to encourage the governments of Cambodia, Laos, and Vietnam to accept back their nationals who have been ordered excluded, deported, or otherwise removed from the U.S. by lawful authority.

3. The Department of Justice has requested that I provide this further supplemental declaration in order to describe the current status of the ongoing diplomatic efforts by the U.S. government to encourage the governments of Vietnam, Cambo-

dia, and Laos to take back their nationals who have been ordered excluded, deported, or removed from the U.S.

4. I have authorized the Department of Justice to use this declaration in connection with similar pending litigation in this and other federal courts.

5. A high level delegation of Department of State, Department of Justice, and Immigration and Naturalization (INS) officials traveled to Phnom Penh, Cambodia; Hanoi, Vietnam; and Vientiane, Laos between February 25 and March 8, 2000 to discuss the repatriation of Cambodian, Vietnamese, and Laotian nationals currently in the U.S. who have been ordered removed to those countries after undergoing immigration proceedings. I was a member of the U.S. delegation, and this declaration is based upon my personal knowledge.

6. The U.S. delegation held discussions with the Cambodian government for approximately six hours on February 28 and 29; with the Vietnamese government for approximately six hours on March 3; and with the Laotian government for approximately two hours on March 6.

7. All three governments were represented by high-level officials from their respective Ministries of Foreign Affairs. In addition, the Vietnamese delegation included high-level officials from the Ministry of Justice and the Ministry of Public Security, and the Cambodian delegation included high-level officials from the Ministry of Interior. Our discussions with all three countries were frank, constructive, and positive in both tone and substance. The U.S. side stressed the importance and urgency that our government attaches to the

repatriation issue. The delegations of all three countries evinced an apparently sincere desire to work constructively with the U.S. to resolve the repatriation issue in the interest of improved bilateral relations.

8. The talks focused primarily on describing how the U.S. deals with similar issues with other countries; on explaining how the repatriation process works in the U.S.; and on eliciting from the three foreign governments what information their authorities might require about potential individual returnees before they would issue appropriate travel documents. The U.S. side made specific proposals concerning the implementation of repatriation agreements and invited the foreign governments to send teams to the U.S. for the purpose of consulting with INS officials to better understand the procedures involved in the removal of aliens from this country. All three governments agreed to respond to us in the near future regarding further discussions. We have already received preliminary advice from our Embassy in Vientaine that the Government of Laos is prepared to invite another U.S. delegation back for further, more detailed discussions as early as April or May. The Department of State is attempting to confirm whether it will be possible to coordinate further discussions with Vietnam and Cambodia during the same time frame.

9. Based upon what I saw and heard during the above-described discussions in Hanoi, Phnom Penh, and Vientiane, I am genuinely and increasingly encouraged that all three countries are interested in achieving agreements with the United States in the foreseeable future that will normalize our bilateral immigration procedures as they af-

fect the repatriation of nationals. I also believe that all three countries are acting in good faith, and that they are sincerely interested in establishing a process that will facilitate a prompt and thorough examination of each case on its individual merits.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed at Washington, D.C.
March 23, 2000

/s/ JAMES G. HERGEN
JAMES G. HERGEN
Assistant Legal Adviser for
East Asian & Pacific Affairs
United States Department
of State

SUPREME COURT OF THE UNITED STATES

No. 00-38

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA, RESPONDENT

Oct. 10, 2000

Case below, 208 F.3d 815.

Motion of Washington Legal Foundation, et al., for leave to file a brief as amici curiae granted. Motion of respondent for leave to proceed in forma pauperis granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case consolidated with No. 99-7791, *Zadvydas v. Underdown*, — U.S. —, 121 S. Ct. 297, — L.Ed.2d — (2000), and a total of one hour is allotted for oral argument.

Supreme Court, U.S.
FILED
NOV 24 2000

NOV 24, 2000

No. 00-38

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of certain aliens, including those who have been convicted of an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released, and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Attorney General of the United States, the Immigration and Naturalization Service (INS), and the INS Acting District Director in Seattle, Washington. The three petitioners were named as respondents in the district court and were appellants in the court of appeals. Respondent is Kim Ho Ma, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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In the Supreme Court of the United States

No. 00-38

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 208 F.3d 815. The July 9, 1999, joint order of five district court judges in this case and four other cases (Pet. App. 34a-51a) is reported at 56 F. Supp. 2d 1149. The July 13, 1999, opinion of the district court ordering an evidentiary hearing in respondent's case (Pet. App. 52a-54a) is reported at 56 F. Supp. 2d 1165. The September 29, 1999, opinion of the district court granting respondent habeas corpus relief (Pet. App. 55a-61a) is unreported. The June 2, 1999, custody decision by the Immigration and Naturalization Service (INS) District Director and the underlying May 6, 1999, custody review report (Pet. App. 77a-86a) are unreported. The September 29, 1999, custody decision of the INS headquarters review committee (Pet. App. 87a-89a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2000. A petition for rehearing was denied on

June 2, 2000 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on July 5, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1231(a) of Title 8 of the United States Code is set forth in relevant part at App., *infra*, 3a-6a.

2. The regulations of the INS that currently govern the detention of aliens beyond the 90-day removal period, 8 C.F.R. 241.4, are set forth at Pet. App. 90a-91a.

3. The February 3, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," is set forth at Pet. App. 64a-68a. The August 6, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors entitled "Interim Changes and Instructions for Conduct of Post-order Custody Reviews," is set forth at Pet. App. 69a-76a.

STATEMENT

1. a. Respondent is a native and citizen of Cambodia who entered the United States as a refugee in 1985 and became a lawful permanent resident in 1987. Pet. App. 56a. In 1996, respondent was convicted in state court of first degree manslaughter after he, along with four other gang members, "ambushed and shot a fellow gang member" in April of 1995. *Ibid.*; J.A. 54; A.R. 144.[1] The five gang members drove up to a parking lot together in a car; two of them got out with guns and opened fire on the targeted gang member. A.R. 144-145. The

[1] A.R. refers to the certified Administrative Record filed by the INS in the district court. See J.A. 3.

shooters then returned to the car and the five gang members attempted to escape, but were apprehended by police after a chase. A.R. 144-146. Respondent was sentenced to three years and two months' imprisonment. Pet. App. 60a n.4.

b. On June 6, 1997, respondent was released from state custody and, pursuant to a detainer previously lodged by the Immigration and Naturalization Service (INS), was transferred to INS custody and ordered detained. A.R. 48, 194, 249. On July 3, 1997, the INS issued respondent a notice to appear, charging him with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) because he had been convicted of an "aggravated felony," which includes a crime of violence for which the term of imprisonment imposed was one year or more, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998). A.R. 36, 186.

On September 12, 1997, an immigration judge found that respondent was subject to removal as charged and was ineligible for asylum and withholding of removal under 8 U.S.C. 1158 and 1231(b)(3) (Supp. IV 1998). J.A. 26-32. Respondent appealed that ruling to the Board of Immigration Appeals (Board), which denied relief. J.A. 44-56. In an opinion dated October 26, 1998, the Board agreed that respondent was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) as an aggravated felon. J.A. 44-46. The Board further held that respondent was ineligible for withholding of removal under 8 U.S.C. 1231(b)(3)(B)(ii) (Supp. IV 1998), which precludes such relief if "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." See J.A. 47. The Board agreed with the immigration judge that respondent's conviction for participating in "a gang related violent ambush resulting in the death of [the] victim constitutes a

particularly serious crime" (J.A. 54), noting, *inter alia*, that he "received almost the maximum sentence that could be ordered based on his criminal record" (J.A. 52-53).

c. During the pendency of his removal proceedings, respondent twice requested redetermination of the denial of his request for release on bond. On October 7, 1997 (J.A. 33-37), and December 31, 1997 (J.A. 38-43), the immigration judge denied those requests. The immigration judge determined that respondent's detention was authorized by Section 303(b)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b)(3)(B), 110 Stat. 3009-587. That section established transitional period custody rules, which authorized the Attorney General to release a lawfully admitted alien in respondent's circumstances during the pendency of removal proceedings, but only if the alien "satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings." *Ibid.*; J.A. 36, 41.[2] The immigration judge determined that respondent "would be a danger to the community if he is released" (J.A. 43), based, *inter alia*, on a psychological evaluation of respondent stating that he "exhibited little insight, denied any knowledge of the instant offense, and said he was not involved in any gang activity despite information to the contrary" (J.A. 42).[3] The immigration judge also

[2] As authorized by IIRIRA Section 303(b)(2), the transitional period custody rules were in effect for a two-year period commencing with IIRIRA's effective date. 110 Stat. 3009-586. See note 23, *infra*

[3] The report explained that "[p]olice reports indicate [that respondent] had been associated with the gang and its members for some time" and that "he was arrested at least twice [before that offense] with one of his codefendants on this case." A.R. 50.

pointed to respondent's lack of credibility in denying that he abused drugs (J.A. 42) and found "nothing in the respondent's file to indicate that he has rehabilitated" (J.A. 43).[4]

2. a. Respondent's order of removal became final on October 26, 1998. The final order of removal extinguished respondent's status as a lawful permanent resident and eliminated any legal right of respondent to remain in this country. See 8 U.S.C. 1101(a)(20) (1994); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. IV 1998); 8 C.F.R. 1.1(p). When the order became final, the INS began the process to remove respondent to Cambodia. By letter dated May 5, 1999, the United States requested travel documents for respondent from the Cambodian government. Pet. App. 58a.

During the 90-day period following the issuance of respondent's final removal order, respondent was detained by the INS pursuant to 8 U.S.C. 1231(a)(2) (Supp. IV 1998). That section mandates detention, during the 90-day period following entry of a final order, of an alien who, *inter alia*, has been found removable based on a conviction for an aggravated felony.

b. The INS was not able to remove respondent to Cambodia within the 90-day period following entry of his final removal order. Upon expiration of that period on January 24, 1999, respondent was no longer subject to mandatory detention. Instead, he was thereafter

[4] In addition, while respondent was in INS detention, he had to be transferred to another detention facility "[d]ue to behavior problems." A.R. 226. In a declaration in support of his request to be transferred to another facility where other INS detainees were housed, respondent acknowledged that he could "almost understand why the immigration judge may not want to release [him] on a bond." A.R. 231.

subject to 8 U.S.C. 1231(a)(6) (Supp. IV 1998), which authorizes the Attorney General to detain an alien who, *inter alia*, has been found removable based on a conviction of an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

The continued detention of an alien under Section 1231(a)(6) is subject to periodic review pursuant to the governing INS regulations, 8 C.F.R. 241.4, and implementing directives, see Pet. App. 64a-68a, 90a-91a. By memorandum dated February 3, 1999, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," the Executive Associate Commissioner of the INS "clarifie[d] the authority of [INS] District Directors to make release decisions and emphasize[d] the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(2) (Supp. IV 1998)]." Pet. App. 64a. The first periodic review mandated by INS procedures is during the 90-day removal period. *Ibid.* Thereafter, a detainee's custody status is automatically reviewed on a periodic basis "to determine whether there has been a change in circumstances that would support a release decision since the 90 day review." *Id.* at 66a.

On April 13, 1999, the INS notified respondent that, because the INS was encountering delays in making arrangements for respondent's removal, it would consider releasing him from detention. J.A. 57-58. The INS explained, though, that before respondent could be released, the INS District Director would have to be satisfied that, if released, respondent would not pose a danger to the community and would appear for all

future proceedings. J.A. 57. The INS listed various factors that the District Director would consider in reaching his decision and notified respondent that he could present evidence that he would not pose a danger to the community and would appear as ordered in the future. J.A. 57-58.

Pursuant to that notice, the INS conducted its first periodic review of respondent's custody in May 1999. That review included an interview of respondent and consideration of supporting documentary material submitted by his family and friends. Pet. App. 77a-86a. On June 2, 1999, the INS notified respondent that it had decided to continue to detain him, based on a consideration of the factors set forth in the governing regulations and all material submitted by respondent during the review process. *Ibid.* That notice detailed the statement made by respondent and his attorney, as well as the evidence submitted by respondent concerning his family ties, but also noted, under "Community Concerns," that respondent "was a member of the 'Local Asian Boyz' (LAB) in the Seattle area and was convicted of Manslaughter in the 1st Degree." *Id.* at 80a. It further noted that respondent had to be transferred to a different detention facility because of conduct while in INS custody. *Ibid.*

The notice informed respondent that his custody would be subject to review again on December 2, 1999. It also informed respondent that he could, at any time, request a redetermination of his custody status, if supported by evidence that he would appear at all future immigration proceedings and that he would not pose a threat to the community. Pet. App. 78a.

3. Meanwhile, on February 2, 1999, respondent had filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, in the United States District Court for the Western District of Washington. J.A. 1. The peti-

tion, as amended, contended that respondent's continued detention was unconstitutional. J.A. 59-65. Respondent's case was one of approximately 100 such cases then pending in the Western District of Washington.

a. On July 9, 1999, five judges of the district court issued a joint order in respondent's case and four other "lead" cases. Pet. App. 34a-51a. The judges addressed the cases jointly because they involved substantive and procedural due process challenges similar to those brought by a large number of aliens who were in INS detention in that district following final orders of removal and whose immediate removal was not then possible. *Id.* at 35a. The court did not, however, question that 8 U.S.C. 1231(a)(6) (Supp. IV 1998) authorizes the continued detention of such aliens as a statutory matter. Pet. App. 38a.

The five-judge panel's joint order established a framework for analyzing an individual habeas petitioner's claim that his detention violates due process. It first rejected the government's submission that the interest of respondent and the other habeas petitioners is the interest in being released into the United States pending their removal. In the panel's view, their interest is, more broadly, a "fundamental liberty interest in being free from incarceration," which requires "strict scrutiny" of any decision to detain aliens in respondent's position. Pet. App. 43a-44a. The panel rejected the government's argument that a more deferential standard should apply because of the plenary power of the Legislative and Executive Branches over immigration matters, holding that such deference does not extend to detention following a final order of removal. *Id.* at 45a.

Applying strict scrutiny, the five-judge panel acknowledged that detention of aliens such as respondent furthers the legitimate governmental interest in securing the safe removal of aliens and what it termed the "incidental" goals of preventing flight and protecting the public from dangerous felons. Pet. App. 46a. In the panel's view, then, the substantive due process question turns on whether the detention is excessive in relation to those goals. *Id.* at 47a. Resolution of that question, it explained, requires a court to "balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." *Ibid.* The panel noted that the government's interest in detention decreases as the probability of removal of the alien decreases, concluding that it would be excessive "to detain an alien indefinitely if deportation will never occur." *Ibid.* Application of that substantive due process test was left to each judge in the individual cases. *Ibid.*

The five-judge panel then turned to the procedural due process question. It reasoned that, if there is no substantive due process violation with respect to a particular alien under the framework it announced, it must be determined whether the procedures for detention of the alien are adequate. Pet. App. 48a. The panel held that the procedures under which INS District Directors made release decisions—based on a review of the administrative file, the alien's written submission or an interview with the alien, and consideration of the criteria identified in 8 C.F.R. 241.4—did not satisfy due process because, in its view, the INS "[did] not meaningfully and impartially review the petitioners' custody status." Pet. App. 50a. The panel therefore held that each habeas petitioner is entitled to a hearing before an immigration judge at which he or she can present evidence in support of release pending removal, and that the habeas petitioner must be able to appeal any

denial of a release request to the Board of Immigration Appeals. *Id.* at 51a.

b. On July 13, 1999, the district court issued an order in respondent's individual case, incorporating the joint order and applying the analysis of that order to his case. Pet. App. 52a-54a. The court determined that certain facts relevant to determining the weight of the government's interest under the due process analysis were not adequately developed in the record, and it ordered an evidentiary hearing. *Id.* at 54a.

c. On September 29, 1999, the district court granted respondent habeas corpus relief. Pet. App. 55a-61a. Although the government contended that the court should not adhere to the joint order in light of intervening developments, including the INS's institution of additional review procedures, the court decided to follow the joint order. *Id.* at 56a n.1.

Applying the framework of the joint order, the court first reviewed the government's representations concerning negotiations between the United States and Cambodia about entering into a formal agreement for the repatriation of Cambodian nationals. Pet. App. 59a. Those negotiations included a meeting in September 1999 between officers of the Department of State and the Cambodian Consulate in Washington, D.C., at which the United States' preliminary proposal for a repatriation agreement was discussed. Despite those developments, the court concluded that "there is not a realistic chance that the government will accomplish [respondent's] deportation to Cambodia." *Id.* at 60a. The court then held that respondent's detention, which it characterized as "indefinite," "violates his right to substantive due process." *Ibid.* The court also noted that, "[e]ven if there were a realistic chance of deporting [respondent], the government has not shown a strong interest in continuing his detention based upon

his threat to the public or his proclivity to abscond." *Ibid.* The court therefore directed that respondent be released subject to appropriate conditions. *Id.* at 61a.[5]

d. The district court stayed its order granting habeas corpus relief in order to permit the government time to seek a stay from the court of appeals. Pet. App. 7a n.9. The court of appeals denied the stay request, and respondent was then released from INS custody on October 25, 1999. *Ibid.* On October 29, 1999, the government filed an application in this Court for a stay of the district court's order pending appeal to the Ninth Circuit. The Court denied that application. 120 S. Ct. 466 (1999).

4. During the pendency of respondent's case, the INS had implemented additional interim review procedures for cases involving aliens such as respondent who are detained in INS custody following issuance of final orders of removal because their immediate removal is not practicable. See Pet. App. 69a-76a. By memorandum dated August 6, 1999, the INS Executive Associate Commissioner directed that, under the new interim procedures, a decision to continue an alien in INS custody would be subject to a review by INS Headquarters. The headquarters review is similar to that afforded under the Cuban Review Plan, 8 C.F.R. 212.12, which has been in place for a number of years to review the status of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R. 212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. Pet. App. 71a.

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[5] In light of its resolution of the case on substantive due process grounds, the court found it unnecessary to address any questions regarding procedural due process. Pet. App. 61a n.5.

Under the interim procedures, the June 1999 decision to continue respondent in custody became subject to INS Headquarters review. That review had not taken place by the time of the district court's September 29, 1999, order granting habeas corpus relief, but the adoption of the additional review procedures was brought to the court's attention. See Pet. App. 57a. The Headquarters review in respondent's case took place on September 30, 1999, and the determination was to continue respondent in INS custody. See *id.* at 87a-89a.[6]

5. The court of appeals affirmed the district court's judgment granting respondent habeas corpus relief, Pet. App. 1a-33a, but without reaching the constitutional grounds on which the district court had relied. The court of appeals instead relied on statutory grounds, holding that the INS lacks authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period. Pet. App. 3a-4a.[7]

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[6] On June 30, 2000, the Commissioner published proposed regulations to put in place a permanent custody-review program that would maintain or enhance the centralized review and other procedural protections set forth in the interim procedures. 65 Fed. Reg. 40,540-40,548.

[7] On March 30, 2000, respondent was arrested for assaulting a female companion. Respondent was released by the state court on bond pending disposition of the resulting criminal charges. On June 26, 2000, the state court dismissed the charges. The State has appealed from that judgment. See *City of Kent* v. *Kim Ho Ma*, No. K24949FV (Mun. Ct., City of Kent, King County, Wash.), notice of appeal (filed July 25, 2000); *City of Kent* v. *Kim Ho Ma*, No. 00-1-07772-2SEA (King County Super. Ct., Wash.), order setting case schedule and deadline of Dec. 27, 2000, for filing of appellant's brief (Sept. 27, 2000).

After respondent's arrest, he was informed by the INS that it intended to revoke his release from immigration custody based on his violation of the terms of release. Respondent filed a motion in district court on April 7, 2000, seeking an order to prevent the INS from ordering him back into custody for violating his release conditions. On April 10, 2000, the court of appeals issued its decision affirming the district court judgment. In light of that decision, the government moved the district court to stay the hearing set for April 19 on the matter of INS's revocation of respondent's release, and the district court granted that motion.

The court of appeals acknowledged that Section 1231(a)(6) unambiguously authorizes the Attorney General to continue criminal aliens in custody "beyond the removal period." Pet. App. 10a. The court concluded, however, that, because Section 1231(a)(6) does not specify a particular length of time during which continued detention is authorized, it should be construed to permit detention "only for a reasonable time beyond the statutory removal period." *Id.* at 11a. "In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future," the court "conclude[d] that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period." *Ibid.* The court explained that it adopted that construction of Section 1231(a)(6) because it allowed the court to avoid deciding the constitutionality of respondent's detention, *id.* at 14a-22a[8]; because the court was unwilling

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[8] The court of appeals rejected the government's argument that the constitutional question was answered by the Ninth Circuit's en banc decision in *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, cert. denied, 516 U.S. 976 (1995), and this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The court distinguished those cases on the ground that they involved excludable aliens, *i.e.* aliens who had not entered the country, rather than aliens who already entered the country and who, the court reasoned, have greater constitutional rights even after a final order of removal is entered against them. Pet. App. 14a-22a. The court noted that the Fifth Circuit, in resolving the constitutional question in *Zadvydas* v. *Underdown*, 185 F.3d 279 (1999),

to conclude that Congress intended to authorize what it termed "indefinite detention" in the absence of a clear statement to that effect, *id.* at 25a; because the court believed that reading a "reasonable time" limitation into Section 1231(a)(6) would be consistent with the Ninth Circuit's interpretation in the 1900s and 1930s of a differently worded detention provision in the Immigration Act of 1917, ch. 29, 39 Stat. 874, *id.* at 26a-29a; and because that interpretation is, in the court's view, more "consonant with international law," *id.* at 11a, 29a-31a. *Ibid.*

The court of appeals then concluded that there is no reasonable likelihood that the INS will be able to remove respondent to Cambodia "[i]n the absence of a repatriation agreement, extant or pending." Pet. App. 32a. Therefore, under the court's ruling, the INS was no longer authorized to detain respondent. *Ibid.*[9]

SUMMARY OF ARGUMENT

The Attorney General is authorized by 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the statutory removal period if the alien, like respondent, cannot be removed immediately from the country and the Attorney General has determined that the alien would pose a risk of flight or danger to the community

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cert. granted, 121 S. Ct. 297 (2000), had concluded that an alien under a final order of removal stands on essentially the same footing as an excludable alien. Pet. App. 20a n.23. The court of appeals declined to adopt that approach, however, and decided, instead, to avoid the constitutional question by its statutory construction. *Ibid.*

[9] On June 2, 2000, the court of appeals denied rehearing and rehearing en banc. Although an active judge requested a vote on whether to rehear the matter en banc, the matter failed to receive a majority of the votes of active judges in favor of en banc consideration. Pet. App. 62a-63a.

if released. The court of appeals' holding that the Attorney General's authority to detain aliens under Section 1231(a)(6) is limited to an unspecified "reasonable time" beyond the removal period is contrary to the text of Section 1231(a)(6), the structure of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the statutory history of the INA's detention provisions, and the Attorney General's authoritative interpretation of the Act, which is entitled to deference. In particular, the court of appeals' ruling that, in the case of an alien who cannot be removed in the reasonably foreseeable future, the "reasonable time" limitation mandates the release of the alien immediately upon expiration of the 90-day removal period—despite a determination by the Attorney General that the alien poses a risk to the community if released—cannot be reconciled with the manifest intent of Congress that dangerous criminal aliens not be released back into the community and that the Attorney General be vested with authority to determine which criminal aliens may safely be released after the 90-day removal period has expired.

A. The plain language of Section 1231(a)(6) provides that certain aliens, including aggravated felons and aliens who are determined by the Attorney General to pose a risk to the community if released, "may be detained beyond the removal period" by the Attorney General. The INA does not place a limit on the length of time beyond the removal period that such an alien may be detained. Section 1231(a)(6) instead leaves to the discretion of the Attorney General the decision whether to continue to detain an alien in such circumstances and, if so, for how long. The text of the INA refutes the court of appeals' assumption that Congress intended to place limits on post-removal-period detention of aliens who cannot be removed immediately due

to the refusal of the designated countries to accept their return. In the provision of the INA immediately following Section 1231(a)(6), Congress expressly provided for such aliens to be exempted from the mandatory bar to the granting of work authorization to aliens who have been ordered removed. See 8 U.S.C. 1231(a)(7) (Supp. IV 1998). If Congress had intended to create a comparable exception for such aliens from the Attorney General's detention authority under Section 1231(a)(6), Congress would have expressly so provided in similar language.

B. The other provisions of the INA governing detention of criminal aliens during the other phases of the removal process, *i.e.*, during the pendency of removal proceedings (8 U.S.C. 1226(c) (Supp. IV 1998)) and during the statutory 90-day removal period (8 U.S.C. 1231(a)(2) (Supp. IV 1998), were enacted contemporaneously with Section 1231(a)(6) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and establish that Congress intended for mandatory detention of criminal aliens to be the general rule. To interpret the exception in Section 1231(a)(6) to that general rule of *mandatory detention* as a provision for *mandatory release* of a criminal alien such as respondent at any time, let alone immediately upon expiration of the 90-day removal period, would undermine one of the central objectives of IIRIRA.

C. Interpreting Section 1231(a)(6) to vest the Attorney General with the authority to detain criminal aliens in respondent's position beyond the 90-day removal period is consistent with the history of the predecessor statutes governing detention of criminal aliens. Moreover, the legislative evolution of the provision that became Section 1231(a)(6) confirms that Congress did not intend to require the release by the Attorney

General of a criminal alien under a final removal order who is determined to pose a risk to the community.

D. If there is any remaining doubt about the scope of the Attorney General's authority under Section 1231(a)(6), it is resolved by the principle that deference is owed by the courts to the Attorney General's interpretation of the INA. The circumstances confronting the Attorney General when the removal of a criminal alien cannot be effectuated because of the recalcitrance of another nation present the very type of serious questions affecting international relations and foreign policy that call for deference to the political Branches. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The Attorney General's interpretation undoubtedly constitutes a reasonable construction of Section 1231(a)(6), and therefore should be sustained by this Court. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

E. The court of appeals erred in construing Section 1231(a)(6) to bar detention of respondent in order to avoid what it believed to be a serious constitutional question. The constitutional-doubt canon cannot be applied to override the clear intent of Congress, as reflected in the text of Section 1231(a)(6). Nor would application of that canon be consistent with Congress's clear intent that deportable criminal aliens such as respondent be treated the same as inadmissible aliens under Section 1231(a)(6). As the court of appeals acknowledged (Pet. App. 17a-18a), there can be no suggestion that Congress intended to mandate the release of dangerous inadmissible aliens after expiration of the removal period because it is well established, under *Mezei*, that an inadmissible alien may be subject to long-term detention when he cannot be removed in the reasonably foreseeable future. And Section 1231 is not susceptible to a constitutional doubt interpretation

analogous to that employed in *United States* v. *Witkovich*, 353 U.S. 194 (1957) (on which the court of appeals relied), because, unlike the statute at issue there, Section 1231(a)(6) specifically provides that, when making a determination whether to detain an alien beyond the removal period, the Attorney General may consider not only the likelihood that the alien will comply with the removal order, but also the risk the alien poses to the community if released. Finally, the court of appeals' substantive due process concerns about respondent's continued detention were unfounded because respondent's detention is not indefinite in light of the Attorney General's administrative review procedures and the ongoing international negotiations with the designated country of removal, see *Zadvydas* v. *Underdown*, 185 F.3d 279, 291, 294 (5th Cir. 1999), cert. granted, 121 S. Ct. 297 (2000), and because, as an alien under a final order of removal, respondent is no longer a lawful permanent resident and is properly treated in the same manner as an excludable alien with respect to the constitutionality of his detention pending removal.

ARGUMENT

SECTION 1231(a)(6) OF TITLE 8 AUTHORIZES THE ATTORNEY GENERAL TO DETAIN AN ALIEN BEYOND THE STATUTORY REMOVAL PERIOD IF THE ALIEN CANNOT BE REMOVED IMMEDIATELY FROM THE COUNTRY BUT THE ATTORNEY GENERAL HAS DETERMINED THAT THE ALIEN WOULD POSE A RISK OF FLIGHT OR DANGER TO THE COMMUNITY IF RELEASED

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that certain aliens who are inadmissible to the United States (8 U.S.C. 1182(a) (Supp. IV 1998)), and certain already admitted aliens

who are deportable from the United States (8 U.S.C. 1227 (Supp. IV 1998)), are to be removed from the country.[10] With exceptions inapplicable here, the inadmissibility or deportability of an alien and the alien's eligibility for any relief from removal are determined in removal proceedings conducted by immigration judges and the Board of Immigration Appeals in the Department of Justice's Executive Office of Immigration Review, pursuant to regulations of the Attorney General. 8 U.S.C. 1228, 1229a (Supp. IV 1998); 8 C.F.R. 3.0-3.65.[11] Whether an alien is detained in the custody of the INS during the pendency of those removal proceedings is governed by 8 U.S.C. 1226 (Supp. IV 1998).

Upon completion of removal proceedings and the entry of a final removal order, the Attorney General is directed by 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998) to remove the alien from the United States within a period of 90 days, which is termed the "removal

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[10] Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 301, 110 Stat. 3009-575, the INA referred to "inadmissible" aliens as "excludable" aliens (*e.g.*, 8 U.S.C. 1182 (1994)), and to "removal" proceedings as "exclusion" or "deportation" proceedings (*e.g.*, 8 U.S.C. 1227, 1252 (1994)).

[11] The removability of an alien who is not a lawful permanent resident and who has been convicted of an aggravated felony may be determined in administrative proceedings conducted by an officer of the INS rather than an immigration judge and the BIA. See 8 U.S.C. 1228(b) (Supp. IV 1998); 8 C.F.R. 238.1(b). Similarly, certain arriving aliens may be ordered removed by an INS officer in expedited removal proceedings without further hearing or review. See 8 U.S.C. 1225(b) (Supp. IV 1998); 8 C.F.R. 235.3(b). Finally, under 8 U.S.C. 1228(c) (Supp. IV 1998), a federal district court may enter an order of removal in a criminal prosecution at the time of sentencing, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner of the INS.

period."[12] Whether an alien is detained in the custody of the INS during that removal period is governed by a separate provision of the INA, 8 U.S.C. 1231(a)(2) (Supp. IV 1998).

In certain cases, the Attorney General may be unable to effectuate an alien's removal during the 90-day removal period. Whether an alien is detained in the custody of the INS beyond the removal period is governed by yet another provision of the INA, 8 U.S.C. 1231(a)(6) (Supp. IV 1998). This case concerns the scope of the Attorney General's detention authority under Section 1231(a)(6). The court of appeals held that if there is not a reasonable likelihood that an alien will be removed to another country in the reasonably foreseeable future, Section 1231(a)(6) requires the Attorney General to release the alien immediately upon expiration of the statutory 90-day removal period—even if the Attorney General has determined that the alien would pose a danger to the community or risk of flight if released, and even though the alien's continued detention is subject to periodic review under procedures specifically tailored to evaluate the alien's situation on an individualized basis. That holding is contrary to the text of Section 1231(a)(6), the structure of the INA, the statutory history of the INA's detention provisions, and the Attorney General's authoritative interpretation of the

[12] The 90-day removal period begins on the latest of: "(i) [t]he date the order of removal becomes administratively final"; "(ii) [i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order"; or "(iii) [i]f the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement." 8 U.S.C. 1231(a)(1)(B) (Supp. IV 1998). The removal period is extended beyond 90 days if the alien fails or refuses to make timely application in good faith for the documents necessary to his departure. 8 U.S.C. 1231(a)(1)(C) (Supp. IV 1998).

Act, which is entitled to deference under *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

A. The Plain Language Of Section 1231(a)(6) Vests The Attorney General With The Authority To Detain Aliens Such As Respondent Beyond The Removal Period

1. Section 1231(a)(6) of Title 8 of the United States Code provides that "[a]n alien ordered removed" who is "inadmissible under section 1182," "removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)," or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal," "*may be detained beyond the removal period.*" 8 U.S.C. 1231(a)(6) (Supp. IV 1998) (emphasis added).[13] The plain language of Section 1231(a)(6) thus vests the Attorney General with the authority to continue an alien in detention beyond the removal period if the alien falls within one of following categories: the alien is inadmissible on any basis (Section 1182); deportable because he violated his nonimmigrant status or a specially imposed condition of entry (Section 1227(a)(1)(C)); deportable because he was convicted of a specified criminal offense (Section 1227(a)(2)); deportable because he engaged in activity that endangered the public safety or national security

[13] Respondent is removable under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) because he was convicted of an aggravated felony. That conviction in itself therefore furnishes a basis for the Attorney General to exercise her discretionary authority under Section 1231(a)(6) to detain respondent beyond the removal period. The Attorney General's determination to continue respondent in detention under Section 1231(a)(6) also rested, however, on her determination that he would pose a risk to the community if released. See Pet. App. 87a (INS headquarters review committee unable to conclude that respondent would remain nonviolent and not violate the conditions of supervision if released).

or related conduct (Section 1227(a)(4)); or is determined by the Attorney General to pose a risk to the community or to be unlikely to comply with the removal order.

The INA contains no language otherwise limiting the Attorney General's authority to detain an alien after expiration of the removal period. In particular, the Act does not place a limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained. To the contrary, by using the term "may," Congress committed to the discretion of the Attorney Generai the ultimate decision whether to continue to detain such an alien and, if so, in what circumstances and for how long. *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion.").

Moreover, the text of Section 1231(a)(6) refutes the court of appeals' conclusion that whether or not the alien will actually be removed in the immediate future is dispositive on the question of continued detention in a case such as this. Section 1231(a)(6) makes clear that, in deciding whether to continue an alien in detention beyond the 90-day removal period, the Attorney General must take into account not only the effect that an alien's release would have on his availability for removal, but also whether the alien would pose "a risk to the community." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). If the Attorney General determines that an alien would pose such a risk if released, the Attorney General is unequivocally granted the authority to detain the alien beyond the removal period on that ground alone, without regard to the likelihood that he will comply with an order of removal and thus actually be removed. Congress's decision to vest that authority in the Attorney General is consistent with the recognition by this Court that detention of dangerous aliens furthers not only the

government's interest in ensuring the alien's availability for removal, but also its distinct interest in protecting the community from aliens who are likely to cause harm if released. See *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

2. There is nothing in the text of Section 1231(a)(6) or any other provision of the INA to support the court of appeals' interpretation of Section 1231(a)(6) to require the release of aliens after expiration of an unspecified "reasonable time" beyond the 90-day removal period. Pet. App. 3a, 10a-11a. And there certainly is no textual support for mandating, as the court of appeals did (*id.* at 3a-4a, 11a), the release of an alien immediately upon expiration of the 90-day removal period if there is not a reasonable likelihood that he will be removed in the reasonably foreseeable future—especially where the Attorney General has determined that the alien poses a risk to the community or would be unlikely to comply with the order of removal.

By "reading an implicit 'reasonable time' limitation into the statute" (Pet. App. 11a), the court of appeals ignored this Court's admonition to resist an interpretation that "read[s] words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). In rejecting the same "reasonable time" argument, the Tenth Circuit emphasized that Section 1231(a)(6) "*expressly* allows for continued detention beyond the removal period with no time limit placed on the duration of such detention." *Duy Dac Ho* v. *Greene*, 204 F.3d 1045, 1057 (2000). That court correctly declined to "substitute its judgment for that of Congress by reading into the statute a time limit that

is not included in the plain language of the statute." *Ibid.* It concluded:

> The unambiguous language of 8 U.S.C. § 1231(a)(6) and the absence of an express time limit on the Attorney General's authority to continue to detain leads this court to conclude that Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens * * * who cannot be removed within the ninety-day removal period.

Ibid.[14]

The Ninth Circuit nevertheless carved out an exception to the Attorney General's post-removal-period detention authority under Section 1231(a)(6) for aliens

[14] In construing Section 1231(a)(6) to require the INS to release an alien in respondent's position immediately upon expiration of the 90-day removal period, the Ninth Circuit relied (Pet. App. 26a-29a) on several decisions by that court, rendered in 1932 or earlier, that arose under the Immigration Act of 1917 and that indicated that an alien should be discharged from custody if he was not removed within a reasonable period of time. As the court of appeals itself pointed out, however, those decisions "did not interpret a statute exactly like the one consider[ed]" here. *Id.* at 28a. Indeed, the earlier statute involved in those cases "provided simply that deportable aliens should be 'taken into custody and deported.'" *Id.* at 26a. That statute did not contain the language that is now found in Section 1231(a)(6) explicitly authorizing detention "beyond the removal period." *Ibid.* Moreover, as the court of appeals also acknowledged (*id.* at 28a), those earlier cases "do not make their reasoning entirely explicit." And all but one of the cases was decided before this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), discussed at pp. 46, 49, *infra*. The one case decided after *Mezei* involved a question about the ongoing validity of a deportation order, not a detention issue; it discussed the earlier Ninth Circuit decisions only in dictum, and did not cite *Mezei*. See *Spector* v. *Landon*, 209 F.2d 481 (9th Cir. 1954).

who cannot be removed in the reasonably foreseeable future, regardless of the risk of flight or danger to the community posed by the alien. The court treated the prospect that the alien might not be removed in the foreseeable future as a possibility not contemplated by Congress, and one that the court assumed would have led Congress to place limits on post-removal-period detention. The court therefore chose to read into Section 1231(a)(6) a prohibition on the continued detention of aliens in that situation. See Pet. App. 11a (court's interpretation permitted it to avoid assuming that Congress intended to allow continued detention of aliens who cannot be removed). Even if we assume, arguendo, that the court could insert a statutory prohibition that appears nowhere in the Act itself, the predicate for the court's approach is erroneous. It is clear from the text of the Act that Congress specifically contemplated that other countries might refuse to accept the return of an alien who has been ordered removed. And it is also clear from the text of the Act that when Congress wanted to treat such aliens differently, it did so explicitly.

Section 1231(a)(7)—the subsection immediately following Section 1231(a)(6)—provides as a general rule that no alien ordered removed is eligible to receive authorization to work in the United States. However, Congress enacted an exception to that ineligibility for situations in which the Attorney General specifically finds that either "the alien cannot be removed due to the refusal of all countries designated by the alien or under [Section 1231] to receive the alien," or "the removal of the alien is otherwise impracticable or contrary to the public interest." 8 U.S.C. 1231(a)(7) (Supp. IV 1998). Certainly, if Congress had intended that the Attorney General not have the discretion under Section 1231(a)(6) to detain beyond the initial 90-day removal

period those aliens who cannot be removed due to the refusal of other countries to receive them, Congress would have expressly so provided by carving out an exception for such aliens in Section 1231(a)(6) in the same manner that it expressly carved out an exception for such aliens from the mandatory bar to the granting of work authorizations in Section 1231(a)(7).[15]

B. Other Statutory Provisions Governing Detention Of Criminal Aliens Confirm That Congress Did Not Mandate The Release Of Criminal Aliens Who Pose A Risk Of Flight Or Danger To The Community

When Congress enacted Section 1231(a)(6) in 1996 as part of IIRIRA (§ 305(a)(3), 110 Stat. 3009-598) to govern the detention of criminal aliens beyond the removal period, Congress enacted two other provisions to govern the detention of criminal aliens during earlier phases of the removal process. Those other detention provisions establish that Congress's intent when enacting IIRIRA was for detention of criminal aliens to be the general rule. The exception in Section 1231(a)(6) allowing the Attorney General to release criminal aliens in certain circumstances was adopted only for criminal aliens who are not removed within the statutory 90-day removal period. To interpret that exception to a general rule of *mandatory detention* as a provision for *mandatory release* of a criminal alien such as respon-

[15] Other provisions of IIRIRA likewise specifically refer to the situation in which another country will not accept the return of its nationals. See IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587 (discussed at note 23, *infra*), and IIRIRA § 307(a), 110 Stat. 3009-614 (discussed at note 25, *infra*). Cf. 8 U.S.C. 1231(a)(1)(C) (Supp. IV 1998) (expressly addressing situation in which alien is not removed because alien fails or refuses to make timely application for documents necessary to removal, and providing for extension of removal period (and thus mandatory detention of criminal aliens) in that situation).

dent, despite a determination by the Attorney General that the alien poses a risk to the community, would undermine one of the central objectives of IIRIRA.

Under 8 U.S.C. 1226(c) (Supp. IV 1998) (enacted in IIRIRA § 303(a), 110 Stat. 3009-585), certain criminal aliens (including aliens like respondent who have been convicted of an aggravated felony) are subject to mandatory detention during the pendency of the proceedings to determine whether they are to be removed.[16] Section 1226(c)(1) provides that the Attorney General shall take covered criminal aliens into custody upon their release from imprisonment under their criminal sentences. See App., *infra*, 2a. The authority of the Attorney General to release a criminal alien during the pendency of removal proceedings is severely restricted. Only aliens whose release is necessary to protect a person involved in a major criminal investigation are eligible for release. Even then, an alien may not be released unless he "satisfies the Attorney General that [he] will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2) (Supp. IV 1998). Congress also specified that, when making a release determination under that provision, the Attorney

[16] The mandatory detention provision in Section 1226(c) applies to aliens who are inadmissible by reason of having committed an offense covered in Section 1182(a)(2) (criminal grounds); inadmissible under Section 1182(a)(3)(B) (terrorist activities); deportable by reason of having committed an offense covered by Section 1227(a)(2)(A)(i) (crimes of moral turpitude, but only if a sentence of at least one year imprisonment was imposed), Section 1227(a)(2)(A)(ii) (multiple criminal convictions), Section 1227(a)(2)(A)(iii) (aggravated felony), Section 1227(a)(2)(B) (controlled substance offenses), Section 1227(a)(2)(C) (certain firearm offenses), or Section 1227(a)(2)(D) (miscellaneous other crimes); or deportable under Section 1227(a)(4)(B) (terrorist activities).

General must consider the severity of the alien's offense. *Ibid.* After removal proceedings are concluded and a removal order becomes final, all criminal aliens are again subject to mandatory detention during the statutory 90-day removal period. 8 U.S.C. 1231(a)(2) (Supp. IV 1998) (enacted in IIRIRA § 305(a)(3), 110 Stat. 3009-598); see App., *infra*, 4a.[17] Section 1231(a)(2) generally provides that the Attorney General shall detain an alien during the removal period, and specifies that, "[u]nder no circumstance during the removal period shall the Attorney General release" a criminal alien. 8 U.S.C. 1231(a)(2) (Supp. IV 1998).

When read as part of this broader statutory context, it is evident that Section 1231(a)(6) constitutes only a relaxation by Congress of the rule of *mandatory* detention of all criminal aliens for those cases in which the alien's removal is delayed beyond the statutory 90-day removal period. At that point, as the text of Section 1231(a)(6) makes clear, the Attorney General continues to have authority to detain the alien; that authority simply becomes discretionary rather than mandatory. Furthermore, in contrast to Sections 1226(c) and 1231(a)(2), under which the termination of the applicable detention authority is demarcated by a particular event (under Section 1226(c), by the completion of removal proceedings, and under Section 1231(a)(2), by the expiration of the statutory removal period), Section 1231(a)(6) does not set a time limit on the Attorney General's authority to continue to detain the alien. Congress's grant to the Attorney General of authority

[17] The mandatory-detention provision of Section 1231(a)(2) applies to aliens who have been found inadmissible under Section 1182(a)(2) (all criminal and related grounds) or 1182(a)(3)(B) (terrorist activities), or deportable under Section 1227(a)(2) (all criminal offenses) or 1227(a)(4)(B) (terrorist activities).

to release criminal aliens at all represented a concession to the fact that Section 1231(a)(6) could result in prolonged detention, and reflected its willingness to place the responsibility on the Attorney General to exercise individualized judgment about whether to release a particular criminal alien who cannot be removed within the 90-day removal period. It would run contrary to the central thrust of all of the IIRIRA detention provisions to suggest that Congress intended not only to allow but to *mandate* release of dangerous criminal aliens at any time, let alone immediately upon expiration of the 90-day removal period, as the court of appeals ordered.[18]

C. The Statutory History Of Section 1231(a)(6) Further Demonstrates That The Attorney General Has Statutory Authority To Detain Aliens In Respondent's Position

1. *The Predecessor Statutes To IIRIRA Support An Interpretation Of Section 1231(a)(6) That Authorizes The Attorney General To Detain Criminal Aliens Beyond The Statutory Removal Period*

An interpretation of Section 1231(a)(6) that allows continued detention of criminal aliens is "also consonant with the history of evolving congressional regulation in this area." *Dunn* v. *Commodity Futures Trading*

[18] At the time respondent filed his habeas corpus petition on February 2, 1999, claiming that his continued detention was unconstitutional, he had been detained under the authority of Section 1231(a)(6) for less than ten days. During the statutory 90-day removal period, which expired on January 24, 1999, respondent's detention was governed by Section 1231(a)(2); and prior to the time a final order of removal was entered, his detention was governed by IIRIRA's transitional period custody rules. See p. 4, *supra*. By the time of the district court's order granting him habeas corpus relief, respondent had been detained under the authority of Section 1231(a)(6) for eight months.

Comm'n, 519 U.S. 465, 475 (1997). Congress's decision when it enacted IIRIRA in 1996 to allow the Attorney General to prevent the release back into the community of dangerous criminal aliens under final orders of removal was a culmination of various congressional actions over the preceding years to protect the community from such aliens.

As we explained in our certiorari petition (at 18-22), since at least 1990, Congress has unequivocally exempted the detention of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to the detention of other aliens. Indeed, Congress has consistently allowed, and at times mandated, that the Attorney General continue to detain aggravated felons. By contrast, nothing in the last decade of amendments to the INA remotely suggests that Congress intended that, rather than having six months to effectuate deportation with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable time" beyond 90 days, which in this case was deemed to be no time at all.

Before the enactment of IIRIRA, the provisions of the INA governing the Attorney General's detention of an alien who was subject to a final order of deportation were found in Section 1252 of Title 8, which had been enacted in 1952 as Section 242 of the INA. 66 Stat. 208. Initially, Section 1252(c) and (d) provided that the Attorney General had a six-month period following entry of a final order of deportation during which to effect an alien's deportation. During that period, the alien could be detained or released at the discretion of the Attorney General. 8 U.S.C. 1252(c) (1982). After expiration of that period, "[i]f deportation ha[d] not been practicable, advisable, or possible, or departure of

the alien from the United States under the order of deportation ha[d] not been effected," the alien became "subject to such further supervision and detention pending eventual deportation" as was authorized in Section 1252. 8 U.S.C. 1252(c) (1982). If an alien's final order of deportation was outstanding for more than six months, the alien was, "pending eventual deportation, * * * subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. 1252(d) (1982).

In 1988, Congress enacted a provision directing the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release the aggravated felon from custody, notwithstanding 8 U.S.C. 1252(a)(1) (1988), which otherwise permitted the discretionary release of aliens while deportation proceedings were pending. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470; 8 U.S.C. 1252(a)(2) (1988). In 1990, Congress amended that mandatory-detention provision to specify, *inter alia*, that it also applied notwithstanding subsections (c) and (d) of Section 1252—the provisions that otherwise generally governed an alien's detention after he became subject to a final order of deportation. The 1990 amendment also added a statutory exception to the mandatory-detention provision that required the release on bond or other conditions of an aggravated felon who had been lawfully admitted for permanent residence, but only if the Attorney General determined that the alien was not a threat to the community and was likely to appear for immigration hearings. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049; 8 U.S.C. 1252(a)(2)(A) and (B) (1988 & Supp. II 1990).

In 1991, Congress amended the statutory exception to the provision for mandatory detention of aggravated

felons to specify that the Attorney General could not release any lawfully admitted alien who was an aggravated felon, "either before or after a determination of deportability," unless the alien demonstrated "to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751; 8 U.S.C. 1252(a)(2)(B) (Supp. III 1991); 8 U.S.C. 1252(a)(2)(B)(1994); see *Duy Dac Ho* v. *Greene*, 204 F.3d at 1056 n.8.[19]

On April 24, 1996, Congress again amended 8 U.S.C. 1252(a)(2) (1994) through enactment of Section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277. That amendment expanded the group of criminal aliens subject to mandatory detention beyond aggravated felons, to include aliens convicted of other specified crimes. *Ibid.* At the same time, the amendment eliminated the provision allowing the Attorney General to release criminal aliens, even those lawfully admitted aliens who she determined would not pose a threat of danger to the community or flight if released. *Ibid.* Thus, as the court of appeals recognized (see Pet. App. 25a n.25), under former Section 1252(a)(2), as amended by AEDPA, 110 Stat. 1277, respondent would have been subject to *mandatory* detention following entry of a final order of deportation for as long as Cambodia refused to accept his return.

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[19] The 1990 amendment only permitted the release of an aggravated felon who had been lawfully admitted for permanent residence. The 1991 amendment applied to any alien who had been lawfully admitted.

It is against that backdrop that Congress, barely five months after it had enacted AEDPA, enacted the provisions of IIRIRA governing the detention of criminal aliens. While those provisions continue to mandate the detention of a criminal alien while removal proceedings are pending and during the 90-day removal period following entry of a final removal order, Section 1231(a)(6) now grants the Attorney General discretion to release a criminal alien after that date. As we explain below, there is no evidence whatsoever to suggest that, in enacting Section 1231(a)(6), Congress intended—in stark departure from the mandatory detention provision in AEDPA and indeed the entire thrust of its approach to the detention of criminal aliens over the course of the preceding decade—not only to permit but to *require* the Attorney General to release an aggravated felon who she determines would pose a danger to the community or a flight risk if released. To the contrary, the legislative history confirms that Section 1231(a)(6) is correctly interpreted, consistent with the congressional actions that preceded it, to ensure that the Attorney General retains the authority to detain such aliens, even when the country to which the alien has been ordered removed has declined to accept his return.

2. *The Legislative History Of Section 1231(a)(6) Confirms The Attorney General's Statutory Authority To Detain Aliens In Respondent's Position*

The legislative evolution of the provision that became Section 1231(a)(6) confirms that Congress did not intend to require the release by the Attorney General of a criminal alien under a final removal order who is determined to pose a risk of flight or danger to the community.

On June 22, 1995, a bill was introduced in the House of Representatives to reform immigration policy in several specific areas, including "removal of illegal and criminal aliens." See H.R. Rep. No. 879, 104th Cong., 2d Sess. 105 (1997) (Report on the Activities of the Committee on the Judiciary during the One Hundred Fourth Congress).[20] The bill,—H.R. 1915—provided, *inter alia*, for "more stringent standards for the release of aliens (particularly aliens convicted of aggravated felonies) during and after removal proceedings." H.R. 1915, 104th Cong., 1st Sess. § 300(3), at 36 (as introduced June 22, 1995). It mandated the detention of aliens during the post-final-order removal period, but authorized release of aliens on bond and supervision if the Attorney General found that there was insufficient detention space. *Id.* § 305(3), at 82. It further provided that, upon expiration of the removal period, *deportable* aliens would be released on supervision (*id.* § 305(3), at 82-83), but *inadmissible* aliens could be continued in detention (*ibid.*) ("An alien ordered removed who is inadmissible under section [1182] may be

[20] Congressional consideration of proposals to ensure that criminal aliens who are ordered removed do not return to the community arose out of a number of legislative proposals to amend the INA, based on recommendations made by the bipartisan Commission on Immigration Reform in 1994 and 1995. The Commission was created by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, chaired by former Representative Barbara Jordan, and was required "to report to Congress with analysis and recommendations regarding the implementation of and impact of U.S. immigration policy." H.R. Rep. No. 879, 104th Cong., 2d Sess. 105-106 (1997). The Commission issued two major reports in 1994 and 1995. *Id.* at 105.

detained beyond the removal period and, if released, shall be subject to [statutory] terms of supervision.").[21]

H.R. 1915 was intended, *inter alia*, to "impose[] greater accountability for the detention and removal of aliens at the close of the hearing process," including by requiring "increased detention of aliens who are ordered removed." H.R. Rep. No. 879, *supra*, at 108. The enhanced detention requirements were based on the fact that "[t]he Inspector General of the Department of Justice ha[d] found that the vast majority of aliens who are not detained at the close of deportation proceedings abscond and are not removed from the U.S., while the vast majority of those who are detained do depart the U.S." *Ibid.*

On August 4, 1995, the bill that ultimately became IIRIRA—H.R. 2202, 104th Cong., 1st Sess.—was introduced and referred to the full Judiciary Committee to be considered in lieu of H.R. 1915. See H.R. Rep. No. 879, *supra*, at 118. On March 4, 1996, the Judiciary Committee reported the bill, as amended, to the House of Representatives. *Id.* at 120. It contained the same provisions for detention of criminal aliens that were in H.R. 1915. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 18-19, 25-26, 234 (1996).[22] When the House

[21] H.R. 1915 also addressed detention pending removal proceedings. It provided for the detention of aggravated felons during that period unless the alien, *inter alia*, satisfied the Attorney General that he would not pose a danger to the safety of other persons or property if released and, if the alien had not been lawfully admitted, was an alien who could not be removed because the designated country of removal would not accept him and who would likely appear for future proceedings, or was an alien whose release was necessary to a major criminal investigation. H.R. 1915, *supra*, § 303, at 53-55.

[22] The Committee Report explained that the provision for detention of aliens after entry of a final removal order, or release on

considered the bill, it adopted further amendments not relevant here, and passed the bill on March 21, 1996. H.R. Rep. No. 879, *supra*, at 121; see 142 Cong. Rec. 6012-6015 (1996).

Less than one month later, however, on April 24, 1996, Congress enacted another immigration reform law, AEDPA. As noted above (see p. 32, *supra*), Section 440(c) of AEDPA amended 8 U.S.C. 1252(a)(2) (1994) to mandate the detention of aggravated felons both prior to and following the entry of a final removal order. That provision originated as Section 303(e)(3) of a Senate bill, S. 735, 104th Cong., 1st Sess. 53-54 (as engrossed in Senate on June 7, 1995). Prior to AEDPA, Section 1252(a)(2) had provided for detention of deportable aggravated felons both before and after a

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conditions to ensure their appearance, was a "significant departure from current law and practice, which often permit aliens who have final orders of deportation to remain in the U.S. indefinitely." H.R. Rep. No. 469, *supra*, at 160. The Report further explained:

> Numerous factors are cited for this failure to deport: insufficient detention space, lack of resources to apprehend aliens for deportation, and archaic procedures which provide advance notice to aliens of when they must report for deportation—a practice charitably characterized as a "run letter." H.R. 2202 specifically addresses all of these factors, by increasing detention space (including the use of closed military facilities on a pilot basis), increasing the number of interior enforcement personnel, including specifically detention and deportation officers, and, in this section, establishing procedures that will ensure that an order of removal is no longer a dead letter, but results in an actual physical removal of the alien.

Ibid. The report then emphasized, however, that the "most critical factor in lax enforcement of deportation orders" was the release of an alien after entry of a final order without assurance of the alien's availability when the INS is ready to remove him. *Ibid.* The provision for detention of aliens following entry of a final order was intended to resolve that problem. *Id.* at 160-161.

determination of deportability, unless the alien had been lawfully admitted to the United States and demonstrated to the satisfaction of the Attorney General that he was not a threat to the community and that he was likely to appear for any scheduled hearing. Section 303(e)(3) of S. 735 expanded the category of criminal aliens subject to detention under former Section 1252(a)(2) beyond aggravated felons, to include aliens convicted of other specified crimes. S. 735, *supra*, at 53-54. At the same time, it eliminated the provision allowing the Attorney General to release such aliens after expiration of the then six-month deportation period—including those aliens who had been lawfully admitted and who she determined would not pose a threat of danger to the community or flight if released. *Ibid.* During a floor debate on June 7, 1995, Senator Kennedy criticized Section 303(e) because

> it require[d] the Attorney General to detain all those in this broadened category of criminal aliens, *with no allowance for those whose home countries will not or cannot take them back.* This is the case today with Cuba, Vietnam, and Bosnia. In these cases, the Attorney General would be required to keep the alien in indefinite detention, even if the offense is relatively light and the Attorney General believes the alien would pose no danger to the community.
>
> This is a drastic and unnecessary expense to the taxpayer. It takes jail space and resources away from more pressing criminal enforcement.
>
> Under this provision, a Cuban refugee convicted of shoplifting in certain States could face life imprisonment in an INS jail.

141 Cong. Rec. 15,068 (1995) (emphasis added). Despite Senator Kennedy's objections, however, Section 303(e) was retained and ultimately enacted as Section 440(c) of AEDPA, 110 Stat. 1277.

It was against that backdrop that consideration of H.R. 2202 was revived and IIRIRA ultimately was enacted. On May 2, 1996, the Senate passed H.R. 2202, but with an amendment substituting the text of another Senate immigration bill, S. 1664, 104th Cong., 2d Sess. (1996). S. 1664 would have amended 8 U.S.C. 1252(a)(2) in a manner somewhat similar to AEDPA, by broadening the mandatory detention of deportable criminal aliens both during and after completion of deportation proceedings, and by limiting the Attorney General's authority to release such aliens to instances involving law enforcement or national security needs. S. 1664, *supra*, § 164, at 130-131 (as introduced Apr. 10, 1996). After H.R. 2202 went to conference, however, the Senate receded (with modifications) to Section 305 of the bill as it passed the House, which contained the House bill's provisions regarding detention of criminal aliens both during and after completion of the removal period. H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 215-216 (1996). See also *id.* at 210-211 (Senate receding to House bill Section 303, with modifications, which contained provisions regarding detention of criminal aliens during pendency of removal proceedings).

As modified in conference, Section 305 allowed, but did not require, the release on supervision of aliens who were ordered removed but were not removed during the removal period. H.R. Conf. Rep. No. 828, *supra*, at 53-54, 215-216. At the same time, Section 305, as modified in conference, expanded the provision in the bill allowing for detention of *inadmissible* aliens beyond the removal period to its current form that also allows for detention of certain *deportable* aliens beyond the

removal period, including aggravated felons and any alien who the Attorney General determines would pose a risk to the community or be unlikely to comply with a removal order if released. *Id.* at 54, 215-216. The Senate and the House agreed to the Conference Report and it was ultimately incorporated in an appropriations bill and signed into law on September 30, 1996. H.R. Rep. No. 879, *supra*, at 122.[23]

IIRIRA's change from the mandatory detention regime of AEDPA to a framework allowing (but not mandating) release under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) upon expiration of the removal period essentially restored the Attorney General's discretionary authority, under former 8 U.S.C. 1252(a)(2)(B) (1994), to release certain criminal aliens, including aggravated felons, from detention after expiration of the removal period if the alien does not pose a threat to the com-

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[23] Although IIRIRA Section 303(a) retained AEDPA's mandatory detention provision for criminal aliens during removal proceedings, 110 Stat. 3009-585, IIRIRA Section 303(b)(2) provided for a two-year transitional period following enactment of IIRIRA if the Attorney General determined that there was insufficient detention space and personnel to carry out that provision, 110 Stat. 3009-586. The Attorney General found that there was not adequate detention space, and the transition period custody rules provided for in Section 303(b)(2) of IIRIRA, 110 Stat. 3009-586 to 587, therefore governed pre-final-order detention during that two-year period from October 1996 to October 1998.

Although those rules governed detention pending removal proceedings and not detention beyond the removal period, which is at issue here, they nonetheless reflected Congress's intent to restrict the release of criminal aliens, specifically including an alien who "cannot be removed because the designated country of removal will not accept the alien," if the Attorney General was not satisfied that the alien would not pose a danger to the community and would likely appear for scheduled proceedings. IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

munity or flight risk. The reasons for restoration of the Attorney General's discretionary authority over post-removal-period detention of deportable aliens are best understood in light of comments by the Department of Justice on the proposed legislation.

Shortly before H.R. 2202 was considered in conference, INS General Counsel David Martin testified before a subcommittee of the House of Representatives. Mr. Martin noted the problems that the INS was experiencing with implementation of the then-recently enacted mandatory-detention provisions of AEDPA. He then expressed the Department of Justice's strong belief that

> a better enforcement strategy would restore at least some of the flexibility previously granted to the Attorney General * * * [and would] *restore the discretion to release* certain aliens cooperating with law enforcement authorities and *others who cannot, despite INS's best efforts, be removed—provided they meet the earlier tests regarding dangerousness and flight risk. The INS fully intends to hold in custody, for as long as necessary, those who are dangerous to the community.*

Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 15 (1996) (emphasis added) (statement of David A. Martin). That testimony echoed the views expressed by the Department in prior correspondence to Members of Congress concerning earlier immigration proposals.[24]

[24] See Letter from Jamie S. Gorelick, Deputy Attorney General, to Henry J. Hyde, Chairman, Committee on the Judiciary 28 (Sept. 15, 1995) (criticizing the requirement in Section 305 of original H.R. 2202 that deportable aliens be released upon expiration of the 90-day removal period if they have not been removed and

explaining that "[t]he requirement that an alien be removed within 90 days ignores the many barriers that are beyond the INS' control. Obtaining travel documents is labor intensive and may take considerable time. Such delays should not prejudice diligent enforcement efforts, and the INS should not be required to release aliens after 90 days in such instances."); *id.* at 29 (recommending "that the [then-]current provisions of the INA—giving the Attorney General the discretion to detain an alien (other than an aggravated felon) after a final order and setting a six month period for removal, with an unlimited time for removal of an aggravated felon—be retained"); Letter from Jamie S. Gorelick, Deputy Attorney General, to Richard A. Gephardt, Minority Leader 31-33 (Mar. 13, 1996) (expressing same concerns about Section 305 of H.R. 2202 as reported by the House Committee on the Judiciary); Letter from Andrew Fois, Assistant Attorney General, to Robert Dole, Majority Leader 33 (Apr. 16, 1996) (expressing strong opposition to the mandatory detention requirements of Section 164 of S. 1664, as reported by the Senate Committee on the Judiciary; suggesting that, "[g]iven the limitations on habeas review of custody status," elimination of the Attorney General's discretion to release aliens who are not a flight risk or a danger to the community and imposition of a mandatory detention regime could raise serious constitutional concerns with regard to permanent resident aliens; explaining that mandatory detention provision would have "a serious adverse impact on the availability of space for the detention of both criminal and non-criminal aliens;" complaining that "[t]here is no provision for release where travel documents can not be secured"; and urging retention of provisions of then-current law that vested the Attorney General with discretion to release a lawfully admitted alien who is likely to appear for future proceedings and presents no danger to the community.); Letter from Jamie S. Gorelick, Deputy Attorney General, to Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Enclosure 5-6 (May 31, 1996) (expressing concern about the recently-enacted provision of AEDPA mandating the detention of nearly all criminal aliens, without exception, during removal proceedings and until removal, and noting the need for a "massive increase in detention resources" to meet that requirement; explaining that the AEDPA provision essentially reinstated an earlier "no-release" rule whose constitutionally had been questioned or that had been held invalid by numerous courts and had led to a 1990 amendment allowing

As noted above, Congress ultimately took the course recommended by the Department when the Senate receded to the modified versions of Sections 303 and 305 of the House-passed H.R. 2202. The legislative record establishes that the modification of Section 305 in conference to grant the Attorney General the authority to continue deportable criminal aliens in detention beyond the removal period (but not to require such detention) was the product of a compromise between the original House version of H.R. 2202, which would have required the release of such aliens upon expiration of the removal period, and the Senate version (and AEDPA), which would have mandated continued detention of such aliens. See pp. 32, 38, *supra*. The modification did not, however, mandate the release of any such aliens, including those whose countries of nationality would not accept their return[25]—particularly where the Attorney General finds that the alien poses a risk to the community. If that had been

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release of a lawfully admitted aggravated felon if he were found "not to be a threat to the community and likely to appear for hearings"; and suggesting that AEDPA invited renewal of such litigation); *id.* at 6 (recommending rejection of Section 164 of the Senate bill and adoption of Sections 303 and 305 of the House bill, which provided the Attorney General with "appropriate discretion regarding the use of detention facilities"). We have lodged copies of those letters with the Clerk of this Court.

[25] When Congress modified Section 305 to allow continued detention of deportable aliens beyond the removal period, it was well aware that certain countries have refused to accept the return of their nationals, and that such refusals could necessitate extended detention of some aliens. See, *e.g.*, IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) (1994) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals from the United States); see also p. 26 & note 15, *supra*.

Congress's intent, it would have adopted Section 305 of H.R. 2022, either as passed by the House or with a modification that applied to a particular category of criminal aliens, such as those who could not be removed to the countries to which they had been ordered removed.

D. The Attorney General's Interpretation Of Section 1231(a)(6) Is Entitled To Deference

As we have explained, the text of Section 1231(a)(6), the structure of the relevant provisions of the INA, and the statutory history of Section 1231(a)(6) all establish that the court of appeals erred in reading into the facially unqualified text of Section 1231(a)(6) a limitation that requires the release of respondent and perhaps several thousand other criminal aliens immediately upon the expiration of the statutory removal period, without regard to whether the Attorney General has determined that they would pose a danger to the community or risk of flight if released. If there is any remaining doubt on the question, however, it is resolved by the requirement that deference is owed by the courts to the Attorney General's reasonable interpretation of the INA.

This Court has long recognized that the political Branches generally enjoy broad power over immigration, *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889), and that the "power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel Mezei*, 345 U.S. 206, 210 (1953). This Court has recognized those principles in the specific context of the detention of aliens by the INS. See *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993). More recently, the Court has reaffirmed that "judicial deference to the

Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 526 U.S. at 425.

The circumstances confronting the Attorney General when the removal of a criminal alien cannot be effectuated because of the recalcitrance of another nation raise the very type of serious questions affecting international relations and foreign policy that require such deference. The negotiations between the Executive Branch and a foreign country concerning the return of an alien, as well as to establish the logistics for accomplishing such a return, can be sensitive and difficult at times for reasons wholly unrelated to the circumstances of any particular alien. It is especially important in that situation for the judiciary to defer to the Attorney General's reasonable interpretation of the statute governing her authority over custody of the alien who has been ordered removed. A different interpretation by a court could be misinterpreted to imply that the United States believes that removal of the criminal alien is futile, contrary to the position of the United States, speaking with one voice through the Executive Branch.

It is for reasons such as these that Congress's plenary power over immigration matters and the Executive's broad powers in foreign relations give particular force in this setting to the usual requirement under general principles of administrative law and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that deference is owed to the reasonable interpretation of an Act of Congress by the agency charged with its administration and enforcement. See *Aguirre-Aguirre*, 525 U.S. at 425; 8 U.S.C. 1103(a) (Supp. IV 1998). The Attorney General's interpretation of Section 1231(a)(6) to authorize detention of

criminal aliens in respondent's position beyond the 90-day removal period is based on the most natural reading of the plain language of the statute, as we have demonstrated above. At the very least, however, it undoubtedly constitutes a reasonable interpretation of Section 1231(a)(6), and therefore should be sustained by this Court. See *Aguirre-Aguirre*, 525 U.S. at 425.

E. The Court Of Appeals Erred In Construing Section 1231(a)(6) To Bar Detention Of Respondent In Order To Avoid What It Believed To Be A Serious Constitutional Question

1. a. Lacking any textual support for its statutory interpretation, the court of appeals invoked the canon of statutory construction that encourages avoidance of an interpretation that raises a serious doubt about the constitutionality of a statute. But the constitutional-doubt canon cannot be applied to override congressional intent. "[W]here Congress has made its intent clear, '[the Court] must give effect to that intent.'" *Miller* v. *French*, 120 S. Ct. 2246, 2253 (2000) (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962)). The constitutional-doubt canon "is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)), and "does not give a court the prerogative to ignore the legislative will," *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986). The court of appeals' invocation of the canon here violates those principles, for it ignores the unqualified text of Section 1231(a)(6), the structure of the INA, and the statutory history of the Act's detention provisions, as well as the Attorney General's authoritative interpretation of those provisions.

Moreover, to interpret Section 1231(a)(6) to mandate release of aliens such as respondent, based on the constitutional-doubt doctrine, would be contrary to the unambiguous intent of Congress that deportable criminal aliens such as respondent be treated the same as inadmissible aliens under Section 1231(a)(6). Section 1231(a)(6) uses the same language to grant the Attorney General authority to detain beyond the removal period aliens who are "inadmissible under section 1182" and aliens who are "removable under section * * * 1227(a)(2)." As even the court of appeals acknowledged (Pet. App. 17a-18a), there can be no suggestion that Congress intended to mandate the release of dangerous *inadmissible* aliens under Section 1231(a)(6) after expiration of the removal period. It is well established, under *Mezei*, *supra*, that an inadmissible alien (termed "excludable" at the time of *Mezei*) may be subject to long-term detention when he cannot be removed in the reasonably foreseeable future. Based on the "presum[ption] that Congress expects its statutes to be read in conformity with this Court's precedents," *United States* v. *Wells*, 519 U.S. 482, 495 (1997), Section 1231(a)(6) must be interpreted in accordance with its plain language to authorize the Attorney General to detain an alien in respondent's circumstances beyond the removal period if the alien is inadmissible. *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 398 (3d Cir. 1999) (holding that Section 1231(a)(6) authorizes the Attorney General to continue to detain an excludable alien beyond the 90-day removal period even where the progress toward the alien's ultimate removal is "agonizingly slow").[26]

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[26] The Ninth Circuit in this case repeatedly limited its ruling to deportable aliens, *i.e.*, those who have "entered the United States" (Pet. App. 3a, 10a, 11a), and distinguished this case from those

Thus, an interpretation of Section 1231(a)(6) based on notions of constitutional-doubt would result in the same statutory provision being given a different meaning depending on whether a particular case involved an inadmissible alien or a deportable alien. This Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally intends the language to have the same meaning. That rule is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). A fortiori here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, Congress must be understood to have intended the same language to confer the same authority with respect to each category.

b. The text of Section 1231(a)(6) also demonstrates that it is not susceptible to a constitutional-doubt interpretation analogous to that employed by the Court in *United States* v. *Witkovich*, 353 U.S. 194 (1957), on which the court of appeals relied (Pet. App. 3a, 11a, 26a). In *Witkovich*, the Court interpreted former Section 1252(d) of Title 8, which imposed conditions of supervision on an alien who was not deported within the then-applicable six-month deportation period. 8 U.S.C. 1252(d) (1952 & Supp. V 1957) (now codified in substantial ly similar form at 8 U.S.C. 1231(a)(3) (Supp. IV 1998)). The Court held that one requirement under former Section 1252(d)—that an alien under a final deportation order give information under oath as deemed proper by the Attorney General, on pain of criminal sanction—was limited to the provision of information that was reasonably calculated to keep the

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involving inadmissible aliens (*id.* at 14a-21a). See also *id.* at 31a-32a n.29.

Attorney General advised regarding the alien's continued availability for deportation (and not, in that case, information regarding the alien's involvement with the Communist Party or other organizations). 353 U.S. at 197-202. The Court interpreted former Section 1252(d) in that manner because the sole focus of that section was on ensuring the alien's continued availability for deportation and because that interpretation avoided constitutional issues that would be raised by a broader one. The Court specifically contrasted former Section 1252(d) with former Section 1252(e), 8 U.S.C. 1252(e) (1952), in which Congress expressed its intent that the Attorney General take into account broader governmental interests when determining whether certain aliens who are not removed should be released from detention, by requiring consideration of "the effect of the alien's release upon national security and the likelihood of his continued undesirable conduct." 353 U.S. at 200.

Section 1231(a)(6) is analogous to former Section 1252(e), not former Section 1252(d), because, like former Section 1252(e), Section 1231(a)(6) expressly authorizes the Attorney General to consider a factor other than the likelihood that the alien will comply with the removal order—namely, the risk the alien poses to the community—when deciding whether to continue an alien in detention beyond the removal period. In light of that text, Section 1231(a)(6) cannot be construed to authorize detention only to ensure the alien's availability for removal, and to render the alien's risk to the community irrelevant, as the court of appeals held.

2. The court of appeals' doubts about the constitutionality of Section 1231(a)(6) are in any event unfounded. The application of Section 1231(a)(6) to aliens in respondent's position fully comports with constitutional due process requirements.

The court of appeals was concerned because of what it characterized as the "indefinite" nature of respondent's detention. Pet. App. 11a, 31a. But respondent's detention was not indefinite or permanent. Although the end of respondent's detention was not demarcated by a specific event, as is an alien's detention pending removal proceedings or detention during the 90-day removal period, his detention was limited by the Attorney General's administrative review procedures. See 8 C.F.R. 241.4; Pet. App. 64a-76a, 90a-91a. Respondent's detention would have ceased when he established that he no longer posed a risk to the community, and he was afforded an ongoing opportunity to make such a showing. Also, INS's detention of respondent would necessarily cease upon his removal from this country—a matter that continues to be the subject of international negotiations (see Pet. 25 n.17). See *Zadvydas* v. *Underdown*, 185 F.3d 279, 291, 294 (5th Cir. 1999) (ruling that the alien's detention was not permanent or indefinite because the alien "may be released when it is determined that he is no longer either a threat to the community or a flight risk"; the alien is entitled to periodic review of his custody under INS administrative procedures; and it had not been clearly established that there was no meaningful possibility of locating a country that would accept the alien's removal or that removal was impossible), cert. granted, 121 S. Ct. 297 (2000).

The court of appeals was also concerned about the constitutionality of respondent's continued detention because, unlike the aliens whose long-term detention was held to be constitutional in *Mezei* and *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995), respondent is not an excludable alien. Rather, respondent is an alien who previously entered the United States (and hence is a

deportable alien) and who therefore, in the court's view, cannot be treated similarly to an excludable alien who is stopped before entering the country. The court of appeals did not adequately consider the consequences of respondent's final order of removal.

Respondent's final order of removal extinguished his status as a lawful permanent resident and eliminated any legal right he had to remain in this country. See 8 U.S.C. 1101(a)(20) (1994); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. IV 1998); 8 C.F.R. 1.1(p). Respondent's status is no longer that of an alien, like the alien in *Landon* v. *Plasencia*, 459 U.S. 21 (1982), who has developed ties to this country and hopes to be able to establish during removal proceedings that he should be allowed to remain in this country and maintain those ties. Thus, the heightened constitutional status accorded respondent as a lawful permanent resident with regard to such matters as due process protections in his removal proceedings no longer applies. *Duy Dac Ho* v. *Greene*, 204 F.3d at 1059. In respondent's circumstances, "the only act remaining to be carried out is the actual expulsion of the alien," and in such a case, "no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens." *Ibid.* (citing *Zadvydas*, 185 F.3d at 294-297).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX

1. Section 1226 of Title 8 of the United States Code (Supp. IV 1998), provides in relevant part:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on–

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of

this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney

General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

* * * * *

2. Section 1231(a) of Title 8 of the United States Code (Supp. IV 1998), provides in relevant part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be

subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States

unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

Dec 22, 2000

Supreme Court, U.S.
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No. 00-38

In The

Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle, Washington; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Section 1231(a)(6) of Title 8 of the United States Code provides that "[a]n alien ordered removed who is inadmissible . . . , removable [for a criminal offense], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period," as that period is set out in 8 U.S.C. § 1231(a)(1)(A). The Immigration and Naturalization Service (INS) maintains that it has the authority to detain Kim Ho Ma pursuant to this provision, even though he is a long-time resident alien of this country, and it cannot deport him in the foreseeable future. The questions presented are:

1. Whether the Attorney General's construction of 8 U.S.C. § 1231(a)(6) violates the due process guarantee of the Fifth Amendment of the United States Constitution because it permits indefinite detention of an alien ordered deported whose deportation cannot be effectuated in the reasonably foreseeable future, even where the government's legitimate interests can be accomplished by less restrictive means.

2. Whether the narrow interpretation of § 1231(a)(6) suggested by the circuit court, to permit detention beyond the 90-day removal period in order to effectuate deportation, is correct because that interpretation avoids the constitutional problem raised by the Attorney General's interpretation and is not contrary to the "plain" intent of Congress.

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OPINIONS AND ORDERS BELOW

In addition to the opinions cited by the government, the district court issued an unreported order denying the government's motion to stay Mr. Ma's release pending its appeal to the circuit court. Cert. Opp. 1a-3a.[1] The circuit court issued unreported orders denying motions to stay Mr. Ma's release pending appeal and pending application for a stay to this Court. Cert. Opp. 4a-6a. The Supreme Court's order denying the government's application to stay Mr. Ma's release pending its appeal is reported at 528 U.S. 1000 (1999). Cert. Opp. 8a. On June 2, 2000, the circuit court issued an unreported order denying rehearing and rehearing *en banc*. Pet. App. 62a-63a.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to 8 U.S.C. § 1231 and 8 C.F.R. § 241.4, *see* Pet. Br. 2, Pet. Br. App. 1a-6a, this case involves 8 U.S.C. § 1253(a)(1) and 8 U.S.C. § 1253(b), which are set forth in relevant part, *infra* at App., 16a.

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[1] The designation "Cert. Opp." refers to Mr. Ma's Brief in Opposition to the government's Petition for Writ of *Certiorari*; "Pet. App." refers to the government's Appendix to its Petition for *Certiorari*; "Pet. Br." refers to the government's Brief for the Petitioners; "JA" refers to the Joint Appendix; and "App." refers to the Appendix attached hereto.

The designation "R" refers to the Excerpts of Record filed by the government; "SER" refers to the Supplemental Excerpts of Record filed by Mr. Ma.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT[2]

1. *Kim Ho Ma's Entry into the United States.* Mr. Ma, the second youngest of five children, was born in the impoverished country of Cambodia on July 6, 1977. He was two years old when he and his family fled Cambodia, escaping the reign of the Khmer Rouge. R 357, 419. Mr. Ma and his family survived in refugee camps in Thailand and the Philippines until the United States granted them permission to resettle here as refugees in 1985. R 354, 357-58, 419-20. In April, 1985, following inspection by the INS, Mr. Ma entered the United States as a refugee. R 356, 358, 420. He worked while attending school and has continuously resided in this country with his family, all of whom are now lawful permanent residents or naturalized citizens. Pet. App. 4a; R 266-74, 279, 322-37.

2. *Mr. Ma's Order of Deportation and the INS's Inability to Effectuate His Deportation.* At age seventeen, Mr. Ma was convicted of first degree manslaughter, which requires a showing of recklessness, and not intent, as the

[2] Mr. Ma has confined the following Statement to those material facts which are either inaccurately stated in, or omitted from, the recitation of facts in the government's Brief. Pet. App. 1a-7a.

government mistakenly states in its Brief. Pet. App. 5a, 56a & 60a n.4; R 300-06.[3] Earning time off for good behavior, Mr. Ma served 26 months of a 38-month sentence. Pet. App. 5a.[4]

After he completed his sentence in June of 1997, the INS took Mr. Ma, then 19 years old, into custody. Pending completion of the deportation proceedings, an immigration judge determined that Mr. Ma was not a flight risk but nevertheless denied the request for bond "strictly because of the seriousness of his crime." Pet. App. 57a. Subsequent requests for release on bond pending completion of his deportation proceedings were denied due solely to Mr. Ma's manslaughter conviction, his only criminal conviction.[5] Pet. App. 5a. Mr. Ma was ordered deported to Cambodia on September 12, 1997, which was affirmed by the Board of Immigration Appeals on October 26, 1998. Pet. App. 4a; JA 44-56.

[3] *See also* Rev. Code Wash. 9A.32.060 (1975); Rev. Code Wash. 9.94A.320 (1995); Rev. Code Wash. 9.94A.310 (1995).

[4] Rev. Code Wash. 9.92.151 (1990).

[5] The psychological evaluation referenced by the immigration judge in Mr. Ma's deportation proceedings was performed in 1997 by the Washington Department of Corrections, not the INS, and was *not* relied upon by the INS to support its conclusion that Mr. Ma should be detained under § 1231(a)(6) pending deportation to Cambodia. Pet. App. 77a-86a; R 207-12. Even then the Department of Corrections characterized Mr. Ma as a "frightened boy" who could be released with supervision. R 207-12. The INS itself concluded two years later that Mr. Ma has no "significant" mental health issues. Pet. App. 80a.

Upon entry of a final order of deportation, the Attorney General is directed by statute to deport the individual from the United States within 90 days. 8 U.S.C. § 1231(a)(1)(A) (1999). The INS could not effectuate Mr. Ma's deportation to Cambodia within the 90-day removal period. Pet. Br. 5.

On May 5, 1999, over five months after the removal period expired (and only after Mr. Ma filed his petition for writ of habeas corpus), the INS requested travel documents from the Cambodian government. Pet. App. 5a. The INS never received a response because Cambodia ignores or refuses to grant such requests as a matter of course, absent a repatriation agreement with the United States. Pet. App. 5a & 5a n.4, 58a; Cert. Opp. 9a-11a. Despite ongoing negotiations to reach a repatriation agreement with Cambodia, no such agreement currently exists. Pet. App. 58a-59a; JA 68-138. In July and September of 1999, the consulate advised Mr. Ma's counsel that Cambodia would not issue the requisite travel documentation for him, or any other Cambodian national. JA 107-11; Pet. App. 10a-12a.

3. *The Challenged Statute and Mr. Ma's Ongoing INS Custody.* If deportation cannot be accomplished during the removal period, the Attorney General must release the individual subject to the INS's supervision. 8 U.S.C. § 1231(a)(3) (1999). However, pursuant to § 1231(a)(6), the provision at issue in this case, the Attorney General "may" detain an individual ordered deported for the commission of a crime "beyond the removal period" if, *inter alia*, that person was deported for a criminal offense or is considered by the INS to be a flight risk or danger to the community. 8 U.S.C. § 1231(a)(6). Pursuant to this

provision, the INS detained Mr. Ma in county jails and federal detention facilities after the removal period expired based upon the INS's opinion that Mr. Ma is "a risk to the community." Pet. App. 5a-7a. This conclusion was based upon Mr. Ma's single criminal conviction, his past gang affiliation, and Mr. Ma's planned participation in a hunger strike while in INS custody.[6] Pet. App. 5a-7a, 79a-85a;[7] *see also* Pet. App. 60a n.3.

Mr. Ma remained confined in INS custody from June of 1997 until the district court ordered his release in September of 1999, almost a year after the deportation order became final and eight months after the expiration of the removal period. Pet. App. 5a.

4. *The Proceedings Below.* In February, 1999, Mr. Ma commenced this action in the Western District of Washington. He challenged his ongoing INS detention on statutory and federal constitutional grounds. JA 59-65; Pet. App. 35a.

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[6] Although the government notes that Mr. Ma was transferred from one INS facility to another, the government omits the fact that the transfer occurred solely as a result of his "planned participation in a hunger strike," his "only 'behavioral problem' " during his more than two years in INS custody. Pet. App. 60a n.3.

[7] Mr. Ma learned of the INS's decision to detain him in a form letter dated June 2, 1999. Pet. App. 5a-7a, 77a-78a. Three months later, without notice to Mr. Ma, an opportunity to be heard or any indication of what materials were considered, INS Headquarters, in a report dated September 30, 1999, recommended that the INS continue Mr. Ma's detention based solely upon his criminal conviction and participation in a hunger strike. Pet. App. 7a, 87a-89a.

By joint order, the district court for the Western District of Washington rejected the government's contention that the continued detention of persons subject to a final deportation order was a constitutional exercise of the Attorney General's power over immigration. Pet. App. 34a-36a, 41a-51a. The court held that: "The critical inquiry . . . is whether an alien's detention is excessive in relation to the[ ] government interest[ ]" in "ensuring the removal of aliens ordered deported" and the goals incidental to that interest of "preventing flight prior to deportation" and "protecting the public from dangerous felons." Pet. App. 47a. To make this determination, "[the court] must necessarily balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." Pet. App. 47a.[8]

An evidentiary hearing was ordered in Mr. Ma's case, in part to determine what efforts the government had made to repatriate Mr. Ma and the likelihood of effectuating deportation. Pet. App. 53a-54a, 57a-58a. On September 29, 1999, the district court granted Mr. Ma's writ of habeas corpus. It concluded that Mr. Ma's deportation was not reasonably foreseeable, and, therefore, Mr. Ma's ongoing detention was excessive in relation to the government's legitimate interest in effectuating his deportation. Pet. App. 2a, 2a n.2, 59a & 60a. Further, the district

[8] The entire district court further found that the procedures governing the detention of individuals subject to a final order of deportation, on their face, deprived the individuals of their respective rights to procedural due process of law. Pet. App. 51a-52a.

court made clear that, "[e]ven if there were a realistic chance of deporting" Mr. Ma, his "interest in liberty clearly outweighs the government's present interests in detaining him":

> [T]he government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

Pet. App. 60a-61a (footnotes omitted); SER 318-69.[9]

Mr. Ma was released over a year ago following the government's unsuccessful attempts to secure a stay of his release. He remains today with his family at their home in Kent, Washington. Pet. App. 7a & n.9; Cert. Opp. 2a-8a.

The circuit court affirmed, holding, pursuant to the constitutional avoidance doctrine, that the Attorney General has the statutory authority to detain a person for a reasonable time beyond the removal period "in order to accomplish the statutory purpose – the removal of the alien," but she does not have the authority to detain that

[9] Because the district court's resolution of the substantive due process claim was dispositive of Mr. Ma's petition, it did not reach the alternative procedural due process claim. Pet. App. 61a n.5.

individual beyond the removal period if deportation cannot be effectuated in the reasonably foreseeable future. Pet. App. 8a-31a. The circuit court found that, despite the United States' good faith negotiations with Cambodia, Mr. Ma's deportation was not reasonably foreseeable. Pet. App. 25a, 32a & 32a n.30.[10]

Rehearing *en banc* was denied on June 2, 2000. Pet. App. 62a-63a. This Court granted a writ of *certiorari* and consolidated the case for oral argument with *Zadvydas v. Underdown*, 185 F.3d 279 (CA5), *reh'g denied*, 199 F.3d 441 (1999), *cert. granted*, 121 S. Ct. 297, 69 U.S.L.W. 3249, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 99-7791).[11]

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[10] Based upon its resolution of the case on statutory grounds, the circuit court did not reach the alternative substantive due process claim. Pet. App. 11a n.14, 22a.

[11] The government has not challenged the lower courts' respective findings of jurisdiction to consider Mr. Ma's statutory and federal constitutional claims. On October 10, 2000, the Court granted the Washington Legal Foundation and Allied Educational Foundation's motion for leave to file a brief as *amicus curiae* challenging, *inter alia*, the federal courts' jurisdiction to entertain any statutory claim in this case. Amicus relies solely upon subsection (e) of 8 U.S.C. § 1226, section 236 of the Immigration and Nationality Act (INA), to suggest the circuit court lacked jurisdiction to decide the statutory question. Amicus Curiae Brief in Support of Petitioners at 13. That provision, which the government has never cited, plainly does not apply to this case because it explicitly covers only the detention of aliens *before* a final order issues "under [§ 1226]." Mr. Ma is detained under § 1231. Pet. App. 3a n.3.

SUMMARY OF ARGUMENT

The Fifth Amendment of the United States Constitution provides, in relevant part, that "no person shall be . . . deprived of life, liberty or property without due process of law." This amendment protects all persons within the United States without regard to race, color, or nationality. It advances the principle that true freedom demands that any deprivation of liberty imposed by the sovereignty must necessarily serve a legitimate government purpose. *See* 9 William Holdsworth, *A History of English Law*, 104-25 (3d ed. 1944).

The Attorney General's interpretation of 8 U.S.C. § 1231(a)(6) is a frontal assault on this basic due process principle. According to the Attorney General, the INS can lawfully imprison a person for an indefinite period based solely upon a deportation order that cannot be effectuated. The Attorney General's interpretation of the statute is constitutionally indistinguishable from the civil commitment held to violate the Due Process Clause in *O'Connor v. Donaldson*, 422 U.S. 563, 574-76 (1975), as well as the punishment without judicial trial held to violate due process in *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896).

The district court correctly concluded that Mr. Ma's detention violated substantive due process because the nature and duration of the detention was excessive in relation to the government's legitimate purpose to effectuate deportation, *i.e.*, his release on INS supervision satisfies the government's interests in avoiding any unreasonable risk of flight or unreasonable risk of danger to the community viewed in light of the forseeability of

effectuating deportation. Cambodia has refused to accept Mr. Ma's deportation and is unlikely to in the foreseeable future. Moreover, as the district court found, there is no evidence that Mr. Ma is a danger to the community or a flight risk. Indeed, even if these factors were present, as this Court has repeatedly held, dangerousness alone cannot justify *indefinite* detention. Further, each of the government's interests can be satisfied through far less restrictive means. For example, Mr. Ma is released under an order of supervision which, if violated, would subject him to severe civil and criminal penalties, including up to ten years imprisonment for failure to report for deportation.

As recognized by the circuit court, the serious constitutional questions raised by the Attorney General's interpretation of the statute can and should be avoided by construing § 1231(a)(6) to permit detention beyond the 90-day removal period only for a reasonable time to accomplish the deportation in a safe and expeditious manner. This is a reasonable interpretation and is not contrary to Congress' "plain" intent.

To justify the Attorney General's assumption of unbridled authority to detain indefinitely, regardless of whether that detention serves any legitimate government interest, the government must show that Congress' "plain intent" was to permit indefinite detention of persons ordered deported but unremovable through no fault of their own. It cannot meet this heavy burden because the plain language of § 1231(a)(6) is silent as to the duration of post-order detention beyond the removal period. Likewise, the legislative history contains no evidence that Congress intended to authorize indefinite detention of

persons who could not be deported through no fault of their own. Indeed, the statutory evolution of post-order detention statutes shows that the Attorney General's contrary view dramatically departs from statutory precedent, which allowed only limited post-order detention in order to effectuate deportation.

For all these reasons, the lower courts were correct in finding that the INS does not have the statutory or constitutional authority to detain Mr. Ma any further. The proper remedy for this violation is release. The grant of Mr. Ma's writ of *habeas corpus* should be affirmed.

ARGUMENT I

THE ATTORNEY GENERAL'S INTERPRETATION OF 8 U.S.C. § 1231(a)(6) VIOLATES THE FIFTH AMENDMENT DUE PROCESS CLAUSE BECAUSE IT PERMITS THE INDEFINITE DETENTION OF AN ALIEN ORDERED DEPORTED WHOSE DEPORTATION CANNOT BE EFFECTUATED IN THE REASONABLY FORESEEABLE FUTURE, EVEN WHERE THE GOVERNMENT'S LEGITIMATE INTERESTS CAN BE ACCOMPLISHED BY LESS RESTRICTIVE MEANS.

A. Indefinite INS Detention Deprives Persons of the Fundamental Right to Be Free from Physical Restraint.

The "core of the liberty" protected by the Fifth Amendment's Due Process Clause is "freedom from physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *see also United States v. Salerno*, 481 U.S. 739, 754 (1987).

Indefinite detention pursuant to § 1231(a)(6) is an involuntary civil commitment that infringes upon this fundamental right of all persons to liberty. Pet. App. 43a-44a. "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

The government in the courts below attempted to diminish Mr. Ma's liberty interest by casting it merely as the interest of an alien under a deportation order to be released into the United States pending deportation. *See, e.g.*, Pet. App. 43a. That characterization incorrectly defines the liberty interest at issue in terms of the Attorney General's justification for the detention. The Attorney General's characterization cannot be reconciled with this Court's definition of the liberty interest in the analogous context of civil commitment of the mentally ill. In *Hendricks*, for example, this Court described the relevant liberty interest as freedom from bodily restraint, not the interest of an individual in being released while suffering from an uncontrollable mental illness. *Hendricks*, 521 U.S. at 356; *see also Foucha*, 504 U.S. at 80.

To the extent the government characterizes the interest as a right to "remain" here, it ignores that people like Mr. Ma do not assert the right to remain here in the United States or a right to absolute freedom pending deportation. Mr. Ma understands should Cambodia ever agree to his return, he must report to the INS for deportation. 8 U.S.C. § 1253(a)(1) (1999). He further understands that he is released subject to the supervision of the INS, which provides for civil and criminal penalties for any willful violations thereof. 8 U.S.C. § 1253(b) (1999); *see, e.g.*, Pet. App. 43a-44a. Moreover, the liberty interest at

stake is no less "fundamental" simply because it is not absolute. For example, in *Salerno*, this Court recognized the "strong interest in liberty" implicated by pretrial detention as "fundamental," notwithstanding its ultimate conclusion that pretrial detention was permissible. 481 U.S. at 750.

The district court properly defined the liberty interest at issue to be a person's fundamental right to "[f]reedom from bodily restraint." *Foucha*, 504 U.S. at 80.

B. Persons Ordered Deported Enjoy the Protection of the Due Process Clause, Not the Lesser Rights Accorded Persons At the Border Awaiting Entry.

The Fifth Amendment's mandate that "[n]o person shall . . . be deprived of life, liberty or property without due process of law," extends to all persons, including citizens, permanent residents and even aliens lawfully or unlawfully within the territorial jurisdiction of the United States. *See Wong Wing*, 163 U.S. at 238, 242; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In 1953, this Court stated:

> once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any*

> *encroachment on those rights by federal or state authority.*

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 & 596 n.5 (1953) (emphasis added). Accordingly, "whatever [a person's] status under the immigration laws," he "is surely a 'person' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

The government tries to avoid this well-established precedent by arguing that the constitutional guarantees of due process do not apply to aliens once they are ordered deported from the United States. Pet. Br. 5, 50. This analysis is in direct conflict with over a hundred years of jurisprudence wherein this Court repeatedly recognized the constitutional rights of all persons present in the United States. *See, e.g., Landon v. Plasencia*, 459 U.S. 21 (1982); *Kwong Hai Chew*, 344 U.S. at 596 & n.5; *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990).

Before this Court is an alien whose "constitutional status change[d]" when he gained admission to this country and lawfully "developed the ties that go with permanent residence." *Landon*, 459 U.S. at 32 (citations omitted). A final deportation order does not extinguish an alien's ties to the community, *Kwong Hai Chew*, 344 U.S. at 596 n.5, nor does the deportation order change his physical presence in this country. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

And this argument is irreconcilable with *United States v. Witkovich*, 353 U.S. 194 (1957), and *Wong Wing*, where this Court held that the person was protected by the Fifth Amendment despite the entry of a final deportation

order. *Witkovich*, 353 U.S. at 195-96, 201; *Wong Wing*, 163 U.S. at 238; *accord Sentner v. Colarelli*, 145 F. Supp. 569 (E.D. Mo. 1956), *aff'd Barton v. Sentner*, 353 U.S. 963 (1957); *see also Vitek v. Jones*, 445 U.S. 480, 492 (1980) (convicted person retains liberty interest despite incarceration).

Ignoring the principles and authority of the above cases, the government relies instead on the rationale advanced in *Ho v. Greene*, 204 F.3d 1045 (CA10 1999), and *Zadvydas*, 185 F.3d 279 (CA5 1999). Pet. Br. 50. But both courts erroneously expanded the holding in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), based upon a strained reading of the facts and analysis in that case. *Ho*, 204 F.3d at 1059; *Zadvydas*, 185 F.3d at 294-97.

Mezei does not support the claim that, by virtue of a final deportation order, a person stands in the same constitutional footing as someone standing at the border seeking entry.[12] First, *Mezei* and its progeny are limited to the unique status of persons who have been stopped at the border and denied entry. Although these individuals may be physically in the United States, they are nonetheless considered to be standing at the border awaiting entry as a matter of law, and thus are accorded limited constitutional rights. *Mezei*, 345 U.S. at 215. As acknowledged by this Court, the rule underlying *Mezei* is a narrow exception to the well-established rule that all persons present in the United States, including aliens like Mr. Ma, enjoy the protections of the Due Process Clause. *Mezei*, 345 U.S. at 212-13; *see also Leng May Ma v. Barber*, 357 U.S.

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[12] *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 985-1020 (1995).

185 (1958); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

Moreover, had the Court directed the INS to release him, Mr. Mezei would have effectively circumvented and nullified the valid exclusion order against him. 345 U.S. at 208. By contrast, persons subject to indefinite detention under § 1231(a)(6) are not invoking the Constitution to avoid deportation. Their release does not reinstate the physical freedom they enjoyed within our borders prior to the final deportation order. Nor does release reinstate lawful residence or any of the privileges associated with that status. *See, e.g.*, 8 U.S.C. § 1427 (1999), 8 U.S.C. § 1641(b) (1999). In fact, in its brief to this Court in *Mezei*, the government itself acknowledged this difference between the indefinite detention of an "excluded alien" and a "deportable alien," such as Mr. Ma. *See* Brief of United States at 19-20, *Shaughnessy v. Mezei* (U.S. Oct. 13, 1952) (No. 139).

Second, *Mezei* was decided at the height of the Cold War. Mr. Mezei had traveled to a Soviet bloc country for 19 months without permission or the requisite reentry papers from the INS. The holding was therefore based, in part, on the unique security risk presented by the times and by Mr. Mezei's arrival at the border, as an alien associated with the Communist Party. *Mezei*, 345 U.S. at 215-16.

Third, *Mezei* was decided before this Court more clearly delineated the substantive limits of the government's ability to civilly commit persons. *Foucha*, 504 U.S. at 80; *Hendricks*, 521 U.S. at 358-60; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). These cases held that preventive

detention of any kind is tolerated only under the most narrow circumstances.

For all these reasons, this Court should reject the government's invitation to expand its decision in *Mezei*, particularly in the face of over a hundred years of precedent recognizing the due process rights of aliens in the United States, including those who have been ordered deported. And while a final deportation order eliminates an alien's status as a lawful permanent resident, 8 C.F.R. § 1.1(p), it does not eliminate or define that person's constitutional rights. The government cites no authority for its contrary position. The courts below properly concluded that persons subject to a final order of deportation still enjoy a right to liberty that is protected by the Due Process Clause.

C. INS Detention Is Excessive If the Nature and Duration of the Detention Is Unrelated to the Purpose for Which the Person Is Being Held.

The substantive component of the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling [government] interest."[13] *Reno v.*

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[13] Even where an interest is not "fundamental," due process requires "a 'reasonable fit' between the government purpose . . . and the means chosen to advance that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993). For the same reasons set forth in Section D below, here, even if a fundamental liberty interest was not at stake, the detention does not "reasonably fit" the government's legitimate interests.

Flores, 507 U.S. 292, 302 (1993) (emphasis in original); *id.* at 316 (O'Connor, J., concurring) (the "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny").

As this Court admonished in *Schall v. Martin*, 467 U.S. 253 (1984), "[t]he mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment." 467 U.S. at 269; *see also Hendricks*, 521 U.S. at 357-58. Rather, "the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the person is committed." *Jackson*, 406 U.S. at 738. Therefore, to decide whether a deprivation of liberty violates substantive due process, the Court must determine whether the government proffers legitimate interests for the deprivation and whether that deprivation is "excessive" in relation to those interests. *Salerno*, 481 U.S. at 747; *O'Connor*, 422 U.S. at 580 (1975) (Burger, J., concurring) (confinement "must cease" when the legitimate government interests "no longer exist"); Pet. App. 44a.

1. *The Attorney General's legitimate interest is to effectuate deportation.*

That the Attorney General has a legitimate interest in effectuating deportation and, in so doing, protecting the public and preventing risk of flight, is not questioned. But where the government is unable to deport the individual, its legitimate interest in effectuating deportation is too attenuated to justify further detention. *See, e.g., Witkovich*, 353 U.S. at 200-02 (scope of immigration statute

limited to its purpose, namely actual deportation of certain aliens); *see also, e.g., Kusman v. District Director of INS at Port of New York*, 117 F. Supp. 541, 547 (S.D.N.Y. 1953); *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925). This is particularly true absent the most compelling evidence that a person presents a particularized threat of flight or danger to the community. *Hendricks*, 521 U.S. at 346 (forbids involuntary detention in the absence of specific substantive criteria); *see also Salerno*, 481 U.S. at 746-50 (only where detention is finite in duration and government proves by "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community," may persons be detained pending trial).

Despite these limitations, the Attorney General erroneously assumes an unrestricted interest in protecting the public, irrespective of her ability to deport. Pet. Br. 22. But the INS does not have a general police power separate from its limited and specific function of effectuating deportations. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-16 (1976). Further, her claim of authority to detain solely for perceived danger has been rejected by this Court in the analogous civil commitment context, where a mere showing of dangerousness does not suffice to justify detention, much less *indefinite* detention. *Hendricks*, 521 U.S. at 358; *see also Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 750-51; *Schall*, 467 U.S. at 269-70; *Addington*, 441 U.S. at 427.

Moreover, this Court has sanctioned involuntary commitment only in conjunction with a statutory scheme that provides substantial procedural safeguards to protect

against erroneous and unnecessary deprivations of liberty. *See Hendricks*, 521 U.S. at 352-53; *see also Foucha*, 504 U.S. at 80; *Bell v. Wolfish*, 441 U.S. 520, 520-21 (1979). But under the Attorney General's construction, § 1231(a)(6) permits detention in the absence of such safeguards, specifically permitting detention without a time limit and in the absence of any constitutionally sound substantive criteria for the detention. *See Salerno*, 481 U.S. at 746-50; *Amicus Curiae* Brief by ACLU Immigrants Rights Project.

The government also contends that Mr. Ma's detention is not "indefinite" because of the INS's administrative procedures, which purportedly cure any substantive due process violation. Pet. Br. 50. The term "indefinite" simply means "not decided or specified," "vague: unclear" and "lacking fixed limits." *Webster's II New Riverside Dictionary Office Edition*, 355 (1984); *see Hendricks*, 521 U.S. at 352-53. More importantly, "the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions *regardless of the fairness of the procedures used to implement them.*" *Foucha*, 504 U.S. at 72 (emphasis added); *Salerno*, 481 U.S. at 746; *Flores*, 507 U.S. at 302. Thus, whether a person's detention pursuant to § 1231(a)(6) is labeled "prolonged," "indefinite," or "long-term," no amount of procedure can cure the fact that substantive due process is violated by a person's detention based upon a deportation order that cannot be effectuated, especially in the absence of a compelling and particularized showing by the government that its ancillary interests in preventing flight and danger to the community cannot be served by less restrictive means. To the extent the process is relevant to any substantive due process analysis, certainly the procedures

here – which lack any consideration of the duration of detention or less restrictive means available and which impose on the detainee the burden to prove he is not a danger – fall short of what this Court's due process jurisprudence requires. *Contrast Salerno*, 481 U.S. at 750.[14]

2. *A deferential standard of review does not apply.*

The government's reliance on the plenary power doctrine is misplaced. Pet. Br. 43-44. It is beyond dispute that the government's plenary power is at its height with respect to substantive immigration decisions concerning admission and expulsion.[15] This case does not involve such a decision but rather concerns a *means* – detention pending deportation – by which Congress chooses to implement its substantive immigration policies. *See INS v. Chadha*, 462 U.S. 919, 940-41 (1983). Moreover, even Congress' plenary power is constrained "by the paramount power of the Constitution." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Chadha*, 462 U.S. at 940-41; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

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[14] On December 21, 2000, the administrative regulations proposed earlier this year were finalized. These regulations do not cure any of the substantive flaws of the earlier procedures as noted above – detention is still indefinite and devoid of any constitutionally acceptable substantive safeguards. *See also, e.g.*, Pet. App. 51a-52a (noting INS improper reliance on past criminal history and fact that an individual is ordered deported to conclude summarily poses risk to community).

[15] *See Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

The government incorrectly relies on *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), to contend that deference is warranted because the release of persons ordered deported infringes on foreign policy concerns. Pet. Br. 17, 43-44. *Aguirre-Aguirre* involved an alien who fled Guatemala after committing a serious non-political crime, and sought refuge in the United States. The Court deferred to the INS's interpretation of the immigration statute, noting that "to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrator to remain in the United States, may affect our relations with that country or its neighbors." 526 U.S. at 425.

Unlike *Aguirre-Aguirre*, this case involves a constitutional question and does not involve the foreign policy issues implicated in *Aguirre-Aguirre*. There is no indication that releasing a deportable alien (here, a long-time resident alien), has any effect on the government's ability to continue negotiations with the foreign state (Cambodia) for the issuance of travel documents. Indeed, the government has maintained throughout these proceedings that negotiations with Cambodia continue today, despite Mr. Ma's release. Pet. Br. 49.

Equally, the sovereignty and foreign policy concerns which informed the courts' analyses in *Jean v. Nelson*, 727 F.2d 957, 975 (CA11 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) and *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (CA9) (*en banc*), *cert. denied*, 516 U.S. 976 (1995), *i.e.*, "losing control over our borders," are not involved here. Mr. Ma is not an alien at the border seeking entry so this case does not involve the foreign policy and national sovereignty concerns associated with the United States' ability

to exclude persons at the border. *See, e.g., Leng May Ma*, 357 U.S. at 190; *Kaplan v. Tod*, 267 U.S. 228, 257-58 (1925); *Nishimura Ekiu*, 142 U.S. at 651.

D. Kim Ho Ma's Indefinite Detention Pursuant to § 1231(a)(6) Is Excessive in Relation to the Government's Legitimate Interests in Effectuating Deportation Because His Deportation Is Not Reasonably Foreseeable and Any Ancillary Interests Can Be Accomplished Through Less Restrictive Means.

Mr. Ma, a long-time resident of this country, was ordered deported in September, 1997. Through no fault of his own, the INS has not been able to deport him. But the INS refused to release Mr. Ma based on a conclusion that his prior conviction indicated a risk to the community.

The district court balanced a combination of factors including the length of past and future detention, the present refusal of Cambodia to accept any Cambodian national, the degree of perceived danger posed and the availability of less restrictive alternatives to detention, to correctly find that Mr. Ma's fundamental liberty interest clearly outweighs the Attorney General's attenuated interest in effectuating his deportation in a safe and expeditious manner.

1. *Mr. Ma's deportation is not reasonably foreseeable.*

One essential factor in determining whether the detention is excessive is the duration of past and future detention. As the duration of the detention increases, so

does the severity of the restriction on Mr. Ma's fundamental right to liberty. *See Jackson*, 406 U.S. at 738. Even detention that may be constitutional at its inception may become unconstitutionally lengthy. *See generally, id.* at 747 n.4. In this case, Mr. Ma was detained for almost a year after the entry of his final deportation order. And a review of the record demonstrates that Mr. Ma's deportation is not reasonably foreseeable. Pet. App. 32a n.30.

The government waited eight months after Mr. Ma's deportation order became final to request travel documents from the Cambodian government for his deportation from the United States. Pet. App. 58a; *see also* Pet. Br. 5. Cambodia expressly refused that request because there is no formal repatriation agreement between the two countries. R 53-54; JA 68-118, 125-31.[16]

Even so, the government claims that Mr. Ma's detention is justified because it will necessarily come to an end upon his removal, "a matter that continues to be the subject of international negotiations." Pet. Br. 49. But nowhere is there any *evidence* that Mr. Ma's deportation is reasonably foreseeable in light of those ongoing negotiations. Indeed, almost a year and a half since this litigation first began, there is no *functioning* informal or formal

[16] The existence of a repatriation agreement is not central to the circuit court's legal holding. The circuit court's decision requires a court to determine whether deportation in each individual case is reasonably foreseeable, not whether a repatriation agreement exists. Here, nothing in the circuit court opinion prevents the INS from detaining persons ordered deported beyond the 90-day removal period *if* they can, in fact, be removed despite the lack of a repatriation agreement. Pet. App. 8a, 31a.

agreement; Cambodia still does not accept the return of its nationals; and there is no evidence that even if a repatriation "arrangement" or "agreement" is in fact reached, Mr. Ma's deportation will readily follow. *See* Ex. A to Respondent's Response to Petitioner's Lodged Document (filed Aug. 31, 2000) at ¶¶ 11-12, 14-16 (May 5, 2000, Hergen Declaration).

The lower courts correctly found that Mr. Ma's deportation is not reasonably foreseeable, despite the good faith efforts of the United States. Pet. App. 32a, 59a-60a; *cf. Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1948) (the Court will not generally reverse findings of fact unless clearly erroneous).

2. *Mr. Ma is not a flight risk or a danger to the community.*

To begin, it is important to note that detention based solely upon a finding of deportability for a past crime violates substantive due process. U.S. Const. amend. V; *see generally, O'Connor*, 422 U.S. at 574-75; *Wong Wing*, 163 U.S. at 237. Further, this case is not one of the narrow circumstances in which the Court has permitted involuntary confinement based solely on a prediction of danger, particularly where, as here, that detention is indefinite. *See, e.g., Salerno*, 481 U.S. at 749 (upheld detention for a finite time and narrowly tailored to government's specific interest in preventing crimes by arrestee).

Turning to the facts of this case, the government has "never [before] suggested [that Mr. Ma] is a flight risk." Pet. App. 60a; R 246. And the record belies any such contention. Cert. Op. 10, 10 n.12. Mr. Ma is currently at

liberty and reporting to the INS every month, as required.[17]

Likewise, there is no evidence of any present danger to the community. The only possible evidence offered is Mr. Ma's single criminal conviction, unsubstantiated speculation of present gang affiliation, and his participation in a hunger strike. But the record confirms that these are merely assertions that fall far short of the requisite compelling and particularized showing necessary to justify further, much less indefinite, detention on this basis. *Contrast Salerno*, 481 U.S. at 750.

While Mr. Ma's prior conviction was for a serious offense, the offense was not the intentional crime the government has repeatedly and inaccurately portrayed it to be. Further, he served a sentence within the standard applicable sentencing range under state law and, in fact, the Department of Corrections awarded him credit against that term for good behavior. Further, there is no evidence that Mr. Ma is presently affiliated with a gang, or that he maintained gang affiliations in his over four years in state and INS custody. To the contrary, Mr. Ma's record contains "abundant information about [Mr. Ma's]

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[17] Although the government has repeatedly turned to general statistics throughout the appellate process to suggest Mr. Ma is now a risk of flight, these statistics, as noted by this Court, should not be "imputed generally to all aliens subject to deportation." *Carlson v. Landon*, 342 U.S. 524, 538 (1952). Equally, the Washington Legal Foundation's reliance on statistics to presume that individuals like Mr. Ma are recidivists is misplaced. The Los Angeles study relied upon by *amicus* tracked recidivism among aliens who were unlawfully present in the United States, not long-time residents like Mr. Ma.

relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior, all of which oppose a finding of future dangerousness." Pet. App. 60a n.3; SER 318-69. And the only "behavioral" problem in his more than four years of custody was his participation in a hunger strike in 1997. Pet. App. 7a, 79a-85a.

Now the government relies upon Mr. Ma's arrest nine months ago for an alleged misdemeanor assault to suggest the lower courts' decisions resulted in the release of a dangerous alien. But the Kent Municipal Court, which has the primary responsibility for protecting the public under these circumstances, ordered Mr. Ma released on bond. More importantly, the court dismissed the case with prejudice. The City of Kent has released Mr. Ma's bond and Mr. Ma has continued to abide by all conditions of his INS release. Cert. Opp. 10a n.12, 19a.

3. *Alternatives less restrictive than detention are available.*

Finally, in evaluating whether detention is excessive, this Court considers whether there are less restrictive alternatives to custody which could address the government's interests while still protecting Mr. Ma's fundamental liberty interest. *See, generally, Jackson*, 406 U.S. at 731-39; *Flores*, 507 U.S. at 302.

Mr. Ma is released subject to supervision by the INS, which includes restrictions on travel, livelihood and associations. 8 U.S.C. § 1231(a)(3) (1999). And the Attorney General and her agents are not left without recourse should Mr. Ma violate the terms of his supervision or

commit another offense. Mr. Ma can be detained and incarcerated if he engages in criminal activity, and he is subject to penalties, including imprisonment for any willful violation of his order of supervision, or for failing to appear for deportation. 8 U.S.C. § 1231(a)(3) (1999), 8 U.S.C. § 1253(a)(1) (1999) and 8 U.S.C. § 1253(b) (1999) (set forth in relevant part, *infra* at App., 16a-17a); Pet. App. 32a, 33a n.31. There is no evidence or reason to believe that the government's interests in protecting the community would not be "vindicated by the ordinary criminal processes involving the charge and the conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." *Foucha*, 504 U.S. at 82.

4. *Conclusion.*

The government's showing in this case would never, in any other circumstance, support the ongoing, indefinite detention of a person in this country and there is no reason why it should suffice in the case of a deportable alien. Mr. Ma's release under an order of supervision is narrowly tailored and satisfies the government's legitimate interests. Detention would, therefore, be excessive in violation of his right to due process of law under the Fifth Amendment of the United States Constitution.

ARGUMENT II

A NARROW CONSTRUCTION OF § 1231(a)(6) TO PERMIT DETENTION BEYOND THE 90-DAY REMOVAL PERIOD FOR A REASONABLE TIME IN ORDER TO EFFECTUATE DEPORTATION IS A REASONABLE INTERPRETATION OF THE PLAIN LANGUAGE OF § 1231(a)(6) THAT IS SUPPORTED BY THE LEGISLATIVE HISTORY AND ELIMINATES THE CONSTITUTIONAL QUESTION.

As demonstrated above, the Attorney General's construction of § 1231(a)(6), particularly as applied in this case, poses serious questions as to the statute's validity under the Fifth Amendment. The alternative reasonable interpretation of § 1231(a)(6) suggested by the circuit court, *i.e.*, that the statute permits detention for a reasonable time in order to effectuate deportation, avoids this constitutional question, and should be followed by this Court because it is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 577 (1988); *see also Jones v. United States*, 529 U.S. 848, 120 S. Ct. 1904, 1911 (2000).

The thrust of the government's argument is that the circuit court's interpretation of § 1231(a)(6) is wrong because there is no clear congressional intent to "mandate release."[18] Pet. Br. 18-48. This argument misconstrues the

[18] To the extent that the government suggests that the circuit court's interpretation results in the unprecedented release of criminal aliens, the government is ignoring the fact that the history of post-final order detention statutes underscores that those statutes have always favored release of persons ordered deported, with detention being the exception.

doctrine of constitutional avoidance. Under this canon, the only question before the Court is whether the statute can be interpreted in an alternative manner that avoids the constitutional problem otherwise raised, and is not plainly *contrary* to Congress' intent. *DeBartolo*, 485 U.S. at 575, 577. The government fails to provide any evidence of "plain" intent by Congress to authorize the prolonged detention of undeportable aliens. Rather, construing § 1231(a)(6) to authorize detention for a reasonable time in order to execute a deportation order in a safe and expeditious manner is entirely consistent with the plain language of § 1231(a)(6), the statutory scheme's evolution, the provision's legislative history, and this Court's due process jurisprudence.

A. The Plain Language of 8 U.S.C. § 1231(a)(6), When Viewed in its Statutory Context, Supports the Circuit Court's Interpretation of That Provision.

The first step in ascertaining the intent of Congress is to consider the plain language of the statute at issue, including the context in which it appears. *See Deal v. United States*, 508 U.S. 129, 132 (1993). Neither the plain language of § 1231(a)(6) nor the statutory scheme of which it is a part reveals a "plain" congressional intent to permit indefinite detention of those who fall within its scope.

See infra 40 & 40 n.30. Moreover, neither of the courts below mandated release in all cases; under either analysis, a case-by-case determination must be made to determine whether the detention sought is reasonable.

1. *The plain language of § 1231(a)(6) is ambiguous.*

Section 1231(a)(6) provides that certain aliens who cannot be removed by the expiration of the 90-day removal period "may be detained beyond the removal period[.]" The term "beyond" simply means "to a degree or amount greater than."[19] Thus, on its face, the statute provides for detention beyond the removal period but is silent about *how long* beyond that period the Attorney General may detain a person ordered deported. Pet. Br. 15, 22; Pet. App. 9a-10a. As the circuit court explained, "to say that the INS may hold persons beyond a particular date does not answer the question 'for how long?' " Pet. App. 10a, 24a-25a.

The government argues that, by this silence, Congress made its intent unmistakably clear to permit indefinite detention irrespective of whether the person's deportation is foreseeable. Pet. Br. 21-29. But that argument depends on construing § 1231(a)(6)'s authorization of detention past the statutory "removal period" for an *indefinite* time, a temporal component that simply does not appear in the plain language. Pet. App. 24a-25a; *see also, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993) ("We may mark the limits of what [the language in a statute] might mean by looking again at what Congress did *not* say." (emphasis in original)). Had Congress intended § 1231(a)(6) to authorize detention for an indefinite duration, Congress could easily have included the

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[19] *Webster's II, New Riverside Dictionary, Office Edition*, 68 (1984).

language "without limitation," "indefinitely" or "until departure," but it did not.[20] Pet. App. 24a-25a n.25. Thus, "any construction of [§ 1231(a)(6)] *must read in some provision* concerning the length of time beyond the removal period detention may continue, whether it be 'indefinitely,' 'for a reasonable time,' or some other temporal measure." Pet. App. 10a (emphasis added).[21]

2. *The Circuit Court's Interpretation of § 1231(a)(6) Is Consistent with Its Statutory Context.*

An examination of § 1231(a)(6)'s statutory context confirms that when Congress wanted to address the problem of undeportable aliens, it did so expressly, and not by implication.

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[20] In fact, in 1949 the House passed legislation that specifically authorized the detention of criminal and subversive aliens "until departure from the United States." *See Hearings on the Detention and Deportation of Aliens*, H. Rep. Subcmte. 1 of the Comm. on the Judiciary, May 20, 1949 at 1-2 (text of H.R. 10). This legislation was ultimately rejected on the grounds that indefinite detention presented a constitutional question. *See Report Facilitating Deportation of Aliens*, S. Rep. No. 81-2239 at 3, 5-6, 8-9 (1950). *See generally, infra* p. 37.

[21] The government's emphasis on the term "may," as well as the fact that the statute authorizes the Attorney General to detain post-order non-aggravated felons whom she determines to be dangerous is misplaced. Pet Br. 22. Nobody denies that the language of the statute is permissive, nor that the statute contemplates detention based on dangerousness. However, neither point resolves the question of whether, in enacting § 1231(a)(6), Congress intended to authorize indefinite detention of aliens whose removal cannot be accomplished.

For instance, at the same time as Congress enacted § 1231(a)(6), it enacted 8 U.S.C. § 1231(a)(1)(C) to address the problem of aliens who cannot be deported because they are obstructing their own deportation, explicitly authorizing their continued detention during such periods. 8 U.S.C. § 1231(a)(1)(C) (1999); *see also* Pet. Cert. 22 n.13; Pet. Br. 42 n.25. Similarly, Congress strengthened a provision, 8 U.S.C. § 1253(d), which authorizes the Secretary of State to discontinue issuance of immigrant and non-immigrant visas to nationals of recalcitrant countries who deny or delay accepting return of aliens. 8 U.S.C. § 1253(d) (1999); *see also* Pet. App. 24a-25a n.25 (citing 8 U.S.C. §§ 1231(a)(1)(A), 1231(a)(1)(C), 1231(b)(2)(C), 1231(b)(2)(D), 1231(c)(3)(A), 1231(c)(3)(B) (1999), as examples of how Congress is aware of time limitations in the detention and deportation context).[22]

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[22] The government cites another provision, 8 U.S.C. § 1231(a)(7) – which authorizes work authorization for individuals who cannot be removed because their countries will not take them back – to support its argument that if Congress had intended § 1231(a)(6) to place a limit on the detention of such aliens, it would have stated so explicitly. Pet. Br. 25-26. But § 1231(a)(7) can be as easily read to demonstrate the knowledge of Congress that such individuals would be released on supervision rather than remaining in detention. It says nothing about whether those individuals can be subjected to indefinite detention under § 1231(a)(6).

The government's reliance on § 1226(c) is similarly misplaced. Pet. Br. 16, 27, 28. That Congress authorized the mandatory detention of criminal aliens during the *pendency* of their *removal proceedings* reveals nothing about whether it intended to authorize the indefinite detention of aliens whose removal orders cannot be effectuated within a reasonable period of time.

Moreover, the present detention statute contains two provisions that impose criminal sanctions on aliens who either refuse to cooperate with their removal or who, having been released from detention, thereafter wilfully violate their conditions of release. *See* 8 U.S.C. §§ 1253(a), (b) (1999). These penal provisions were initially added to the Immigration and Nationality Act (INA) in 1950 as a *substitute* for a proposed provision that would have authorized indefinite detention of undeportable aliens; this indefinite detention provision was rejected on constitutional grounds. *See Report Facilitating Deportation of Aliens,* S. Rep. No. 81-2239 at 3, 8 (1950). All of these provisions are part of a statute, the express presumption of which, is that all persons ordered removed "shall" be removed from the United States within 90 days. 8 U.S.C. § 1231(a)(1)(A) (1999); Pet. Br. 19-20. And in general, those who are not removed within that period must be released on an order of supervision. 8 U.S.C. § 1231(a)(3) (1999).

In construing the statutory language and its context, courts do not assume Congress intends to infringe constitutionally protected liberties nor that it intends to permit an anomalous result. *DeBartolo,* 485 U.S. at 575, 577; *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994); *United States v. Brown,* 333 U.S. 18, 26-27 (1948); Pet. App. 24a. But under the Attorney General's interpretation of § 1231(a)(6), for instance, Congress authorized the indefinite detention of not only dangerous persons but also a wide range of people whose deportation orders, for instance, were based solely upon the failure to maintain non-immigration status, *e.g.,* overstaying a visa. 8 U.S.C. § 1231(a)(6) (referencing 8 U.S.C.

§ 1227(a)(1)(C)). It is absurd to assume Congress intended to permit the indefinite detention of visa-overstays, even without a showing of danger or flight risk, as would logically follow from the Attorney General's reading of the statute. *See* Pet. Br. 21 n.13; 8 U.S.C. § 1231(a)(6) (authorizing post-deportation detention of aliens deported under, *inter alia,* 8 U.S.C. § 1227(a)(1)(C)).

Moreover, it would be anomalous to impute to Congress the intent to authorize the indefinite civil detention of such aliens when other provisions of the statute expressly place a limit on how long an alien can be *criminally* sentenced for violating conditions of release, 8 U.S.C. § 1253(b) (1999) (maximum sentence one year), or wilfully preventing one's deportation (maximum sentence of 10 years). 8 U.S.C. § 1253(a).

In short, the plain meaning of "beyond the removal period," in the context of the entire statutory scheme, is at best ambiguous. Certainly it does not evince a "plain" intent to permit indefinite detention.

B. The Legislative History Supports the Circuit Court's Interpretation of § 1231(a)(6).

1. *The statutory evolution of immigration detention statutes demonstrates that the circuit court's interpretation is not contrary to Congress' "plain" intent.*

The government places great reliance on a series of amendments between 1988 and 1996 which imposed strict restrictions on the release of criminal aliens both during and after their removal proceedings to bolster its view that Congress intended to authorize indefinite post-final

order detention of aliens ordered deported. Pet. Br. 29. Mr. Ma agrees that these amendments evidence Congress' intent to treat criminal aliens more harshly than other aliens ordered deported. But nowhere do these statutes expressly provide for indefinite detention of those aliens who cannot be deported through no fault of their own. Nor is there evidence that that was Congress' intent. Indeed, when viewed in the context of the pre-1988 statutory framework, under which post-final order detention of deportable aliens was strictly limited, it is the government's construction – which *assumes* Congress, for the first time, intended to permit the INS to "hold people in detention for the remainder of their lives," Pet. App. 24a – that marks a "stark" departure from past law. Pet. Br. 29.

(a) Post-Final Order Detention Pre-1988

Before 1950, the Immigration Act of 1917 did not contain any time limitation on the Attorney General's authority to detain an alien ordered deported. *See* Senate Report 2239, July 20, 1950, pp. 5-6.[23] Nonetheless, that

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[23] The 1917 statute and § 1231(a)(6) are analogous in that neither sets forth a specific time period for detention post-deportation order:

Section 19 of the 1917 Act	*8 U.S.C. § 1231(a)(6)*
Any alien who [commits any of the enumerated offenses] . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.	An alien ordered removed . . . may be detained beyond the removal period and, if released, shall be subject to . . . supervision . . .

See infra, App. 1a-2a.

statute was uniformly construed by the courts to authorize detention for only a "reasonable" period of time to effectuate deportation. *Wolck v. Weedin*, 58 F.2d 928, 930-31 (CA9 1932); *Saksagansky v. Weedin*, 53 F.2d 13, 16 (CA9 1931); *see also United States ex rel. Ross v. Wallis*, 279 F. 401, 403 (CA2 1922).[24]

In 1949, the House proposed a bill to allow the government to detain deportable persons for up to six months in order to effectuate a deportation order. For a subclass of criminal aliens and "subversives," however, the bill specifically called for their indefinite detention "until departure from the United States." Cong. Rec. – House, July 17, 1950 at 10449; H.R. Rep. No. 81-1192 at 2, 6-7, 9-10 (1949). The Senate Committee rejected the indefinite detention provision on the grounds that it "appears to present a Constitutional question," and provided "in its stead penal provisions to be invoked by judicial process against deportable aliens . . . who fail[ed] to depart from the United States."[25] *Report Facilitating Deportation of Aliens*, S. Rep. No. 81-2239, at 8 (1950). Thus even in the Cold War context of the 1950's, Congress recognized the

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[24] The government attempts to diminish the import of these decisions simply because they were decided before this Court's decision in *Mezei*, 345 U.S. 206 (1953). Pet. Br. 24. However, as set forth *supra* pp. 15-17, *Mezei* is distinguishable from these cases, particularly as they involved *deportable*, as opposed to *excludable*, aliens.

[25] These penal provisions were later enacted as part of the Internal Security Act of 1950, but with a requirement of a "wilful" failure to depart.

due process rights of deportable aliens and the constitutional problems raised by their detention pending deportation.

As noted earlier, the final version of the 1950 Act did include a provision, commonly referred to as the "six-month rule," which authorized post-final order detention of deportable aliens for a maximum of six months, followed thereafter by release under supervision. Congress viewed this as a grant of additional authority, since courts had previously held that aliens could be detained for only a few months. *See supra* p. 32 n.20, citing Senate Report 81-2239 (1950) at 5-6. In explaining the Committee's choice of six months, the Senate Report states, "[t]he Committee considers that six months is a reasonable time to grant to our Government within which to conclude the necessary detail work involved in some cases before deportation of an alien can be effected." *Id.* at 6. *See former* 8 U.S.C. § 1252(c)(1952) (reprinted at App. *infra* 3a); Pet. Br. 30. Federal courts strictly interpreted the six-month time limit contained in the statute as prohibiting any detention of deportable aliens beyond six months. *See, e.g., Shrode v. Rowoldt*, 213 F.2d 810, 813-14 (CA8 1954); *see also Oguachuba v. INS*, 706 F.2d 93, 96 (CA2 1983); *Johns v. Dept. of Justice*, 653 F.2d 884, 890 (CA5 1981); *Castillo-Gradis v. Turnage*, 752 F. Supp. 937, 941 (S.D. Cal. 1990).[26]

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[26] Moreover, even though the statute authorized detention for six months, the courts continued to impose a reasonable time limit on detention depending upon whether the detention served the Attorney General's legitimate interest in effectuating deportation. *See, e.g., Kusman v. District Director*, 117 F. Supp. 541, 544 (S.D.N.Y. 1953); *United States v. Witkovich*, 140 F. Supp. 815, 819 (N.D. Ill. 1956); *Nwankwo v. Reno*, 819 F. Supp. 1186 (E.D.N.Y. 1993); *Iheme v. Reno*, 819 F. Supp. 1192 (E.D.N.Y. 1993).

(b) 1988-1996 Criminal Alien Amendments

The government places great weight on a series of amendments in 1988, 1990 and 1991 which eliminated the six-month rule for aliens with aggravated felony convictions and prohibited their release except under certain circumstances. Pet. Br. 31-32; *see former* 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991); Pet. App. 24a & n.25. By adding mandatory language prohibiting the release of aggravated felons, Congress for the first time provided a statutory basis for the INS to detain a limited group of deportable aliens beyond a six-month period. But research disclosed no evidence – on the face of the statutes or in the legislative history – that Congress intended this language to authorize the indefinite detention of undeportable aliens.[27]

Likewise, the 1996 amendment, § 440(c) of AEDPA[28] – which eliminated the Attorney General's discretion to release aggravated felons from detention even if they posed no danger or flight risk – does not contain any express reference to detention of undeportables. 8 U.S.C. § 1252(c) (April 24, 1996). This absence is particularly

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[27] Indeed, because these amended provisions make no specific mention of undeportable aliens, they could just as plausibly be construed as not applying under such circumstances. This would not be surprising given that undeportable aliens comprise a small percentage of the total number of deportable aliens. *See supra* p. 33 n.22.

[28] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277.

significant when compared to § 508(c)(2)(C) of AEDPA, which contained express language allowing for detention of alien terrorists "when no country is willing to receive such alien." The absence of similar express language in AEDPA § 440(c) suggests that it was not intended to authorize indefinite detention of undeportable aliens.

In any case, when Congress enacted the current statute, § 1231(a)(6), in 1996 as part of IIRIRA,[29] it repealed the mandatory language in the prior provisions which *prohibited* release of certain criminal aliens. In its place, Congress substituted the *permissive* language of § 1231(a)(6), granting the INS discretion to release criminal aliens or detain them beyond the 90-day period. Pet. App. 24a n.25. Thus, even assuming that the mandatory language authorized indefinite detention, it cannot be said that, by replacing that language with the permissive language in § 1231(a)(6), Congress manifested clear intent to authorize the indefinite, and potentially permanent, detention of undeportable persons.[30]

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[29] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 301, 110 Stat. 3009-575.

[30] The government's citation to *Carlson v. Landon*, 342 U.S. 524 (1952), to suggest *detention* is the norm, and release the exception, is misplaced. That decision dealt with the validity of detention without bond of an alleged Communist *pending deportation proceedings*. 342 U.S. at 526-27; *see also Witkovich*, 353 U.S. at 201 (*Carlson* involved the question of "whether an alien can be detained during the customarily brief period pending determination of deportability"; it did not involve the issue of whether an alien can be detained after entry of removal order that cannot be executed); Pet. App. 14a n.16. In fact, release from detention for deportable aliens has always been the norm,

2. An examination of the legislative history of § 1231(a)(6) demonstrates that the circuit court's interpretation is not contrary to Congress' "plain" intent.

Plainly the general thrust of § 1231(a)(6) was the expeditious deportation of persons ordered deported, and criminal aliens in particular. However, nowhere in the legislative history of § 1231(a)(6) is there any discussion or indication that Congress intended to indefinitely detain aliens whose final deportation orders could not be effectuated, through no fault of their own.

Indeed, the extensive committee reports on IIRIRA, the "authoritative source" of legislative intent, *Garcia v. United States*, 469 U.S. 70, 76 (1984), are conspicuously silent as to Congress' intentions. Given the long history of limited post-order detention and the fact that prior efforts to authorize indefinite detention of aliens were rejected by Congress on constitutional grounds, the government is hard-pressed to show that Congress would have authorized such a dramatic change without at least some debate and discussion of the issue.

The government's reliance upon letters and testimony by the Department of Justice to individual members of Congress is misplaced. Pet. Br. 40-42 & n.24. These letters do not directly address the particular question of whether Congress intended to authorize indefinite detention. More importantly, statements by interested parties

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detention the exception. *See Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

concerning the nature and effect of the bill are an unreliable basis for inferring the intent of Congress, particularly where, as here, they are not incorporated into a committee report or adopted by a committee member.[31] *See Garcia*, 469 U.S. at 76, 78.

Finally, isolated comments of Senator Kennedy regarding an earlier AEDPA mandatory detention provision do not pertain to the statute at issue here. Pet. Br. 37. Even if they did, they are not probative of Congress' purported clear intent to permit indefinite detention, potentially life imprisonment, of undeportable aliens, particularly where the subsequent legislative history contains no comment upon, explanation of, or opposition to Senator Kennedy's comments regarding the validity of the provision. Indeed, as this Court has repeatedly found, "the fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981) (citing to *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951), and *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972)).

3. *Conclusion.*

At the very least, Mr. Ma's detention pursuant to § 1231(a)(6) raises serious constitutional doubts as to the

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[31] The government's reliance upon the statements of then INS General Counsel David Martin is equally unpersuasive, particularly where his testimony occurred at an ancillary hearing that was not convened to address the pending legislation. Pet. Br. 40.

validity of § 1231(a)(6). To avoid the constitutional question raised by the Attorney General's interpretation of § 1231(a)(6), this Court should construe the statute, as suggested by the circuit court, consistent with its plain language and legislative history, to permit detention beyond the removal period only for a reasonable time to effectuate deportation. *DeBartolo*, 485 U.S. at 575; *Witkovich*, 353 U.S. at 199; Pet. App. 11a-24a.[32] In each individual case that interpretation avoids an unreasonable risk of flight or unreasonable risk of danger to the community viewed in light of the forseeability of effectuating deportation.

The fact that the statute also covers individuals who, unlike Mr. Ma, have been ordered excluded, does not render the circuit court's interpretation unreasonable or the government's interpretation constitutionally permissible. *See* Pet. Br. 46. Congress cannot circumvent the Constitution by its choice to incorporate both groups of individuals under one umbrella provision; the canon of constitutional avoidance must still apply. *See, e.g., Public Citizen v. United States Department of Justice*, 491 U.S. 440, 465-67 (1989); and *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 936 n.36 (CA D.C. 1995) (applied same construction of the statute from *Public Citizen* in case that would not have raised constitutional problems) (citation omitted).[33]

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[32] As the circuit court noted, a reasonable construction of the statute also avoids violating international law. Pet. App. 29a-31a.

[33] In fact, an interpretation that permits detention for a reasonable time in order to effectuate deportation in a safe and

C. Because the Government's Interpretation of § 1231(a)(6) Poses a Serious Constitutional Question, a More Deferential Standard of Review Does Not Apply.

The government's argument against the application of the constitutional avoidance doctrine in this case further rests on the erroneous assumption that the Attorney General's interpretation of § 1231(a)(6) is entitled to substantial deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), as it was applied in *Aguirre-Aguirre*, 526 U.S. at 415.

However, as this Court found in *DeBartolo*, where the agency's interpretation of a statute raises serious questions regarding the provision's constitutional validity, the constitutional avoidance doctrine is applicable; *Chevron* deference is not.[34] *DeBartolo*, 485 U.S. at 574-75; *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Equally, Mr. Ma's claim is not insulated from judicial scrutiny simply because it involves immigration. The doctrine of constitutional avoidance applies with equal force in immigration cases, as it would in any other matter. *Witkovich*, 353 U.S. at 202.

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expeditious manner still requires each case be considered on its particular facts. Accordingly, what may be reasonable for an "excludable" alien may not be the same for someone like Mr. Ma.

[34] Unlike the instant case, *Chevron* deference applied in *Aguirre-Aguirre* because that case did not involve a serious constitutional question regarding the validity of the challenged statute.

The government objects to that conclusion, arguing that the circuit court's reliance on *Witkovich* is misplaced. Pet. Br. 47-48. However *Witkovich* is simply an example of how "courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems." Pet. App. 12a. Certainly invoking the canon here, as this Court did in *Witkovich*, is entirely appropriate where "issues touching liberties that the Constitution safeguards, even for an alien 'person' would fairly be raised on the Government's view of the statute." *Witkovich*, 353 U.S. at 201.

For all the reasons stated, the circuit court properly interpreted the statute in a manner consistent with ordinary tenets of statutory construction and the well-established doctrine of constitutional avoidance.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Immigration Act of 1917, 39 Stat. 874

Sect. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime of moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes

gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by Immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

APPENDIX B

1952 Statute

Former Section 242(c), 8 U.S.C. § 1252(c), 66 Stat. 208 (1952), reads, in pertinent part:

Sec. 242(c) [8 U.S.C. § 1252 (1952)]

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision

and detention pending eventual deportation as is authorized in this section . . .

APPENDIX C

1988 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1988)) as amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470, reads in relevant part:

Sec. 242 [8 U.S.C. 1252 (1988)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

(2) The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction. Notwithstanding subsection (a) of this section, the Attorney General shall not release such felon from custody.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during

which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of Title 41 or section 278a of Title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation,

remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

APPENDIX D

1990 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1990)) as amended by the Immigration Act of 1990 § 504, Pub. L. No. 101-649, 104 Stat. 4978, reads in relevant part:

Sec. 242 [8 U.S.C. 1252 (1990)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

* * *

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the

alien is likely to appear before any scheduled hearings.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

APPENDIX E

1991 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1991)) as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751, reads in relevant part:

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

> (1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .
>
> (2) (A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.
>
> (B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a

> threat to the community and that the alien is likely to appear before any scheduled hearings.
>
> * * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney

General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of Title 41 or section 278a of Title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

APPENDIX F

1996 AEDPA Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (Apr. 24, 1996)) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 404(c), Pub. L. No. 104-132, 110 Stat. 1277, reads in relevant part:

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

* * *

(2) The Attorney General shall take into custody any alien convicted of any criminal offense covered in Section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by Section 241(a)(2)(A)(ii) for which both predicate offenses are covered by Section 241(a)(2)(A)(I),

upon release of alien. Notwithstanding paragraph (1) or subsections (c) and (d) of this section, the Attorney General shall not release such felon from custody.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

(d) Supervision of deportable alien; violation by alien

Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General.

APPENDIX G

1. Section 1253(a)(1) of Title 8 of the United States Code (1999) provides in relevant part:

§ 1253. Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who –

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph

(1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

2. Section 1253(b) of Title 8 of the United States Code (1999) provides in relevant part:

An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Jan 29. 2001

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No. 00-38

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ACTING ATTORNEY GENERAL, ET AL., PETITIONERS

v.

KIM HO MA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A. *Statutory Authority.* The Ninth Circuit plainly erred in holding that the Attorney General's statutory authority to detain dangerous criminal aliens under 8 U.S.C. 1231(a)(6) (Supp. V 1999) is limited to an unspecified "reasonable time" beyond the 90-day removal period—and, in particular, that the statute does not allow the Attorney General to hold such aliens beyond that 90-day period if there is not a reasonable likelihood that they will be removed in the reasonably foreseeable future. As we demonstrate in our opening brief (at 18-45), that holding is contrary to the text of Section 1231(a)(6), the structure of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the statutory history of the INA's detention provisions, and the Attorney General's authoritative interpretation of the Act.

1. a. Section 1231(a)(6) provides that an alien "may be detained beyond the removal period" if, *inter alia*, the alien has committed a specified criminal offense, or has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. 8 U.S.C. 1231(a)(6) (Supp. V 1999). Section 1231(a)(6) imposes no temporal or other limitations on the Attorney General's discretion. To the contrary, as the Tenth Circuit emphasized, Section 1231(a)(6) "*expressly* allows for continued detention beyond the removal period with no time limit placed on the duration of such detention." *Duy Dac Ho* v. *Greene*, 204 F.3d 1045, 1057 (2000). Compare *Lopez* v. *Davis*, No. 99-7504 (Jan. 10, 2001), slip op. 10-11 (constraints urged by prisoner on Bureau of Prisons' discretion "are nowhere to be found" in the statute).

Contrary to respondent's contention (Br. 31-32), Section 1231(a)(6) is not ambiguous merely because it does not specify how long the Attorney General may detain an alien. Congress granted the Attorney General the authority to detain or release an alien at *any* point "beyond the removal

period." If there is any lingering doubt, however, the Attorney General's determination that the facially unqualified text of Section 1231(a)(6) authorizes detention of an alien who poses a danger to the community even if the alien's country of citizenship has not agreed to his prompt return is reasonable and is entitled to deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); compare *Lopez* v. *Davis*, slip op. 11.

b. Respondent's citation (Br. 32-34) to INA provisions that specifically address situations in which an alien cannot be removed because of obstruction by the alien or recalcitrance by his country of citizenship supports, rather than undermines, the Attorney General's interpretation of Section 1231(a)(6). In particular, 8 U.S.C. 1231(a)(7) (Supp. V 1999), the subsection immediately following Section 1231(a)(6), provides that, although generally aliens who are ordered removed are ineligible to receive work authorization, that prohibition does not apply if an alien "cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien." That exception in Section 1231(a)(7) refutes respondent's suggestion that Congress did not contemplate that other countries might refuse to accept an alien when it enacted the broad detention authorization in Section 1231(a)(6), and it demonstrates that Congress would have carved out an express exception to that authorization if it had intended to require that such aliens be treated differently for detention purposes. See Gov't Br. 25-26; see also Gov't Br. 39 n.23, 42 n.25.

c. Respondent contends that Congress could not have meant to allow "indefinite" detention under Section 1231(a)(6) of aliens whose removal orders were based on grounds that are not premised on dangerousness. See Resp. Br. 34-35 (citing 8 U.S.C. 1227(a)(1)(C) (Supp. V 1999) (visa violations)). Congress, however, did not *mandate* the detention of those or any other aliens covered by Section 1231(a)(6), and perhaps many or most of the aliens respondent has in

mind would be released by the Attorney General as neither dangerous nor flight risks. But respondent is mistaken to suggest that an alien whose order of removal is not based on a criminal conviction could not pose a risk of danger to the community or of flight if released. Compare *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 473 (1999) (aliens believed to have raised funds for terrorist organizations charged with deportability for overstaying visas).

d. Respondent asserts (Br. 35) that it is anomalous to interpret Section 1231(a)(6) to allow for detention that may extend beyond the criminal sentence that could be imposed for violation of conditions of release (8 U.S.C. 1253(b) (Supp. V 1999) (one-year maximum)) or willfully preventing one's own removal (8 U.S.C. 1253(a) (10-year maximum)). But detention of an alien who poses a danger to the community prevents harm from occurring in the first place, rather than imposing punishment after the fact. Moreover, a primary purpose of Congress in enacting Section 1231(a)(6) and the other detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, was to prevent criminal aliens from reentering our criminal justice system. Unlike imprisonment as punishment for a crime, which in some instances may preclude removal of an alien even after a travel document becomes available (see 8 U.S.C. 1231(a)(4)(A) (Supp. V 1999)), immigration detention allows an alien to be removed as soon as a travel document is obtained.

2. As we explain in our opening brief (at 31-33), and as respondent concedes (Br. 35-36, 39-40), Section 1231(a)(6) is the culmination of a series of amendments to the INA, dating back to 1990, that mandated the detention of certain criminal aliens even after the expiration of the six-month period following entry of a final deportation order— at least in the absence of a showing by the alien or determination by the Attorney General that the alien was not a threat to the

community and was likely to appear for any scheduled hearings. See Gov't Br. 31-33; Resp. Br. App. 8a-15a (reproducing relevant statutory provisions). None of those amendments made any exception for aliens who could not be deported because their countries of citizenship would not take them back.

Respondent nevertheless claims (Br. 36) that the Attorney General's interpretation of Section 1231(a)(6) to grant him the discretion to detain such aliens "marks a 'stark' departure from past law." To support that contention, respondent asserts (*id.* at 39-40 & n.27) that those predecessor provisions, despite their explicit text, did not actually apply to what respondent calls "undeportable aliens," because those provisions did not specifically refer to such aliens. See *id.* at 36, 39-40 & n.27. Respondent cites nothing (and there is nothing) in the text, legislative history, or judicial interpretation of any of those amendments to support that assertion. Indeed, the most common reason why an alien cannot be removed promptly is that the alien's country of citizenship has declined to accept his prompt return; and, in any event, Congress's overriding concern was that criminal aliens would commit further crimes while they remained in the United States, irrespective of *why* they remained here. Respondent's argument for an implied exception from those predecessor statutes therefore is inconsistent with the central premises of their authorization for continued detention.[1]

[1] Respondent notes (Br. 36-37) that in cases in the 1920s and early 1930s arising under the Immigration Act of 1917, ch. 29, 39 Stat. 874, several lower courts had held that an alien ordered deported could be detained for only a "reasonable" time to effectuate deportation. That Act was not at all similar to Section 1231(a)(6) because it contained no provision expressly authorizing detention beyond a deportation period. It provided simply for an alien to "be taken into custody and deported" (Resp. Br. 36 n.23), which suggests detention only *during* a period of actual deportation. In any event, the rationale of those old decisions is unclear, and they are of no relevance in interpreting Section 1231(a)(6), which has a distinct text and statutory history. See also Gov't Br. 24 n.14.

It is, in fact, respondent's interpretation of Section 1231(a)(6) that would reflect a dramatic change from the detention provisions that preceded its enactment. Under respondent's interpretation, the Attorney General would be required to release a criminal alien in respondent's circumstances immediately upon expiration of the 90-day removal period—despite the Attorney General's determination that the alien would pose a danger to the community or a risk of flight if released. There is no evidence whatsoever to suggest that Congress intended a radical departure from the mandatory detention provision in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that would not only permit but *require* the Attorney General to release such an alien. As we have explained (Gov't Br. 33-43), the legislative history of AEDPA and IIRIRA confirms that Congress did not do so, but instead vested the Attorney General with discretion to release criminal aliens "whose home countries will not or cannot take them back," if "the Attorney General believes the alien would pose no danger to the community." See

Respondent also notes (Br. 32 n.20, 34, 37) that in 1950, Congress failed to pass a bill that would have authorized detention of certain aliens "until departure from the United States." As respondent points out (Br. 37), the House did pass that bill, in an effort to address the situation in which another country would not accept the return of dangerous aliens. See H.R. Rep. No. 1192, 81st Cong., 1st Sess. 3, 6-7, 9-10 (1949). The Senate did not agree to that provision. Respondent quotes a statement in the Senate Report that the provision "appears to present a Constitutional question" (Br. 37 (quoting S. Rep. No. 2239, 81st Cong., 2d Sess. 8 (1950)), and asserts on that basis that the provision "was rejected on constitutional grounds" (Br. 34). The Senate Report expressly states, however, that "[t]he committee, *without undertaking to pass on the constitutionality of this provision*," decided to delete it and to provide instead for criminal sanctions against certain criminal aliens who fail to depart the United States. S. Rep. No. 2239, *supra*, at 8 (emphasis added). All the legislative history of the 1950 Act shows, then, is that Congress decided not to enact then what it found necessary to enact in 1996. That episode half a century ago has no bearing on the interpretation of Section 1231(a)(6).

Gov't Br. 37 (quoting 141 Cong. Rec. 15,068 (1995) (remarks of Sen. Kennedy)).[2]

Under the Ninth Circuit's interpretation, by contrast, the Attorney General must release a criminal alien no matter how serious the risk of danger (or flight) the alien would pose, whenever a court determines that there is not a reasonable likelihood that the alien will be removed in the reasonably foreseeable future. Pet. App. 23a, 25a. And the Ninth Circuit's decision has in fact resulted in the release of many aliens who were found to present a serious risk of harm or flight if released—a finding supported in many cases by a substantial criminal history.[3]

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[2] Respondent attempts (Br. 42) to dismiss Senator Kennedy's comments as mere expressions of "fears and doubts" by an opponent of legislation. What respondent overlooks is that Senator Kennedy was speaking in opposition to Section 440(c) of AEDPA, which flatly prohibited the release of criminal aliens, and was urging that Congress instead enact a provision granting the Attorney General discretion to release a criminal alien whose country would not take him back. See Gov't Br. 37-38. Congress did precisely that when it enacted Section 1231(a)(6) as part of IIRIRA less than six months later. Congress acted in response not only to Senator Kennedy, but also to urging by the INS and Department of Justice, see Gov't Br. 40-42 & n.24, and as a compromise between the House version of the bill (which would have *mandated* the release of criminal aliens after the removal period) and the Senate version (which would have *prohibited* the release of such aliens); see *id.* at 34-35, 38.

[3] See, *e.g.*, *INS* v. *Your Khorn*, No. 00-668, Pet. at 4-7 (filed Oct. 26, 2000) (criminal history of repeated rape of children and no evidence of rehabilitation); *INS* v. *Oudone Mounsaveng*, No. 00-751, Pet. at 4-6 (filed Nov. 9, 2000) (convictions for rape of minor, reckless endangerment, drug possession, and attempt to elude police; juvenile adjudications arising out of street gang robberies of gun store (during which gang member was killed) and home (where masked gang members held 20 people at gunpoint); at least four arrests for failure to appear and two for probation violation; and disciplinary action while in custody for possession of sharpened instrument); *INS* v. *Saroeut Ourk*, No. 00-987, Pet. at 4-6 (filed Dec. 15, 2000) (conviction for rape of minor arising out of armed gang kidnapping and repeated rape and sexual assault of victim; repeated violations of parole); *INS* v. *Be Huu Nguyen*, No. 00-1000, Pet. at 4-7 (filed Dec. 18, 2000) (extensive criminal history, including convictions for drug-related offenses, disciplinary action for assaulting another detainee while in custody,

B. *Substantive Due Process.* Respondent argues (Br. 11-28), apparently as an alternative ground for affirmance, that Section 1231(a)(6) violates substantive due process if it authorizes the Attorney General to detain criminal aliens whose countries of citizenship will not accept responsibility for their repatriation, even if the Attorney General determines that the alien would pose a risk to the community or would be unlikely to comply with the order of removal if released. The court of appeals did not decide the constitutional issue, because it held that Section 1231(a)(6) does not grant the Attorney General that authority as a statutory matter. We address the substantive due process argument in our brief for the respondents in *Zadvydas* v. *Underdown*, No. 99-7791, which squarely raises that issue and has been consolidated with this case for oral argument. We address here several points made by respondent and his amici.

1. Respondent erroneously characterizes the government's position to be that "the constitutional guarantees of due process do not apply to aliens once they are ordered deported from the United States." Resp. Br. 14; see also *id.* at 13-15, 17. That is not our position. Aliens in the United States under final orders of removal are "persons" for purposes of the Due Process Clause. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982).

The entry of a final order of deportation or removal *does*, however, extinguish a person's status as an alien lawfully admitted for permanent residence, and it eliminates whatever legal right any alien might once have had to be in this country. See 8 U.S.C. 1101(a)(20) ("term 'lawfully admitted for permanent residence' means the status of having been

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and repeated violations of parole and INS supervision conditions while on earlier release from INS custody); *INS* v. *Thanh Duc Tran*, No. 00-985, Pet. at 4-7 (filed Dec. 15, 2000) (convictions for attempted murder and assault with firearm, flight from jurisdiction and fugitive from justice for two years, federal drug trafficking conviction, and institutional misconduct).

lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed*") (emphasis added); 8 C.F.R. 1.1(p) (lawful permanent resident status "terminates upon entry of a final administrative order of exclusion or deportation"). Thus, although respondent is correct that he once was "an alien whose 'constitutional status change[d]' when he gained admission to this country and lawfully 'develop[ed] the ties that go with permanent residence'" (Br. 14 (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982))), he ignores the fact that his status has now changed back to what it was before he was granted resident status, and he has no lawful right to maintain the ties that go with permanent residence.[4] Because an alien like respondent no longer has any right to be in the United States, or to work or to maintain any ties here, the alien has a greatly diminished claim to a liberty interest in being released into the community of the United States.

Entry of a final order of removal also has a significant bearing on what process is "due," both substantively and procedurally, with respect to detention and other immigration matters up to the point when the alien is actually removed from the United States. In determining what process is due, substantial weight must be given to the good faith judgments of Congress and of the Attorney General, to whom Congress has assigned the responsibility for administering the INA and for weighing the relevant factors in doing so. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

[4] *Plasencia* teaches that, if an alien has been granted permanent resident status and has not departed from the United States for a significant period, that status will affect what process is due in proceedings to determine *whether* a final order of removal will be entered and the alien will be stripped of his privilege of remaining in the United States. See 459 U.S. at 32-37. But contrary to respondent's suggestion (Br. 14), *Plasencia* does not support the notion that heightened due process protection continues to apply even after permanent resident status is formally terminated. Respondent's reliance (Br. 13-14) on *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953), is misplaced for the same reasons.

In that regard, Congress has made clear, in the series of amendments culminating in the enactment of Section 1231(a)(6) in 1996, that in its judgment detention of a criminal alien under a final order of removal is justified if the alien poses a risk to the community or is unlikely to appear for further immigration proceedings—two undoubtedly legitimate concerns of the government. *United States* v. *Salerno*, 481 U.S. 739, 747, 749 (1987). See *Zadvydas* Gov't Br. 27-28 nn.13 & 14 (discussing widespread commission of crimes by criminal aliens after being released by INS during deportation process, as well as disappearance of criminal aliens who were released).

As the Fifth Circuit held in *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), for purposes of due process scrutiny of detention under the immigration laws in these circumstances, Congress reasonably may regard an alien like respondent, who is deportable and subject to a final order of removal, as standing on essentially the same footing as an excludable alien who has been ordered removed after seeking to enter the United States. *Id.* at 288-290, 294-297; accord *Duy Dac Ho* v. *Greene*, 204 F.3d 1045, 1058-1059 (10th Cir. 2000) (citing *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953)).[5]

Respondent contends (Br. 15-17) that *Mezei* does not support our position because the alien in that case was "excludable" (see Gov't Br. 19 n.10) while respondent was "deport-

[5] Congress treated the specified categories of deportable aliens and all "excludable" aliens (now termed "inadmissible" aliens, see Gov't Br. 19 n.10) the same for purposes of Section 1231(a)(6), vesting the Attorney General with the discretionary authority to detain both beyond the removal period. Congress also made no distinction between deportable and excludable aliens when it authorized the Attorney General to detain any alien the Attorney General determines "to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (Supp. V 1999).

able." But the due process analysis here turns not on the alien's status or the nature of the removal charges against him *before* entry of a final order of removal, but rather on the remaining interests the alien has *after* entry of such an order, weighed against the governmental purposes furthered by the detention. As explained above (pp. 7-9), after entry of a final removal order, an alien's lack of any right to be in the United States, and his resulting lack of any cognizable right to maintain and enjoy ties here, are the same whether the alien was previously excludable or deportable. Similarly, the United States' interests in protecting its national sovereignty, in not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country, in protecting our society from any such foreign nationals who would pose a danger if released, and in ensuring the continued availability of an alien ordered removed, are the same whether the alien was previously excludable or deportable.

Furthermore, as a matter of sovereign power, the government's right to expel aliens who previously were permitted to reside in the United States "rests upon the same grounds, and is as absolute and unqualified, as the right to prevent their entrance into the country" in the first place. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707, 713 (1893) (see Gov't Br. 37-38). For deportable as well as excludable aliens, Congress may legitimately determine that "other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs." *Mezei*, 345 U.S. at 216. Indeed, insofar as the alien's own country of citizenship is concerned, the alien is that country's responsibility *rather than* ours, and the alien must look primarily to that country for his liberty, once it allows him to return.[6]

[6] Respondent asserts (Br. 16) that in its brief in *Mezei*, the government acknowledged a difference between the indefinite detention of an excludable alien and a deportable alien. The government's brief in *Mezei* noted that two district courts had held that aliens could not be detained indefinitely while the INS sought to carry out their deportation orders, and stated that that theory was erroneous when applied to exclusion cases. Gov't Br. at 20 & n.9, *Mezei*, *supra* (No. 139). The brief went on to state that the then-recent 1950 amendments to the immigration laws limiting the period of detention pending deportation to six months (see note 1, *supra*) were "appropriate because confinement in deportation cases is merely a step in aid of expulsion and, if too long continued, the confinement takes the place of the deportation which was ordered." *Id.* at 20. That statement of a possible rationale for a six-month detention period in the statute as it then existed does not affect the constitutionality of Section 1231(a)(6), which embodies Congress's considered judgment, in the current domestic and foreign context, that the Attorney General should be authorized to detain an alien beyond the now-90-day removal period, when necessary to protect the community.

2. Contrary to respondent's contention (Br. 21-23), substantial deference is due under the Constitution to the Attorney General's decision to detain an alien under a final deportation order, pursuant to authority expressly granted by Congress. This Court has long recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). As we explain in our opening brief (at 44) and in our brief in *Zadvydas* (at 20-22), there is no exception to these fundamental principles of deference for matters concerning the detention of aliens who have been ordered removed from the United States. Indeed, "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896).

Issues concerning the detention or release of such aliens have clear implications for the Nation's sovereignty, security, and foreign relations. These concerns may be especially

pronounced when the removal of a dangerous criminal alien cannot be effectuated immediately because of the refusal by another nation to accept responsibility for its own citizens. That could be true, for example, when the other country's refusal is part of a broader diplomatic schism between the two nations, or when arrangements for repatriation are linked to efforts at a more general normalization of relations. There would be serious adverse consequences for the United States if that other country, simply by refusing to accept the return of its own citizens, could force the United States to allow those aliens to be at liberty in the United States, even if they would cause harm to the community or flee if released. And those consequences would be exacerbated if a court of the United States ordered the release of the aliens on the basis of its own determination that they are unlikely to be removed in the near future because of such recalcitrance. The effect would be to undermine the position of the political Branches in the international community that the other nation must promptly accept the return of its citizens who have been ordered deported from the United States. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS* v. *Aguirre-Aguirre*, 526 U.S. at 425. For these reasons, the plenary power of the political Branches over immigration matters necessarily encompasses the formulation of policies concerning the detention of aliens against whom removal proceedings have been commenced or a final order of removal has been entered. See *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993).

This Court has also made clear that, when Congress vests in the Attorney General the discretionary authority over detention decisions regarding aliens subject to deportation, such decisions are subject to only the most deferential standard of judicial review. See *Flores*, 507 U.S. at 306 (INS regulation governing detention must meet "the (unexacting) standard of rationally advancing some legitimate governmental purpose"); *Carlson* v. *Landon*, 342 U.S. 524, 540-541 (1952) (noting congressional intent "to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse"); *Mezei*, 345 U.S at 210; *Zadvydas* Gov't Br. 23. Respondent's argument (Br. 17, 20-21, 27-28) for heightened due process scrutiny (requiring least-restrictive-means or narrow-tailoring) cannot be reconciled with those rulings.

3. Respondent concedes (Br. 18) that the government "has a legitimate interest in effectuating deportation and, in so doing, protecting the public and preventing risk of flight." Accord ACLU Br. 2. Respondent contends (Br. 23-28), however, that detention of aliens in his position is unconstitutionally excessive compared to the interests the government seeks to protect. That contention is without merit. If the Attorney General concludes that an alien under a final order of removal would pose a danger to the community or risk of flight if released, then retention of that alien in custody beyond the 90-day removal period, subject to periodic review, corresponds directly to Congress's legitimate interests. In *Mezei* and *Carlson*, the Court sustained the continued detention of aliens based on determinations of future dangerousness. See *Zadvydas* Gov't Br. 29-31. The Court also has upheld the constitutionality of detention based on future dangerousness in other contexts, involving citizens, where the special deference to the political Branches in matters regarding aliens was not even involved. *Kansas* v. *Hendricks*, 521 U.S. 346, 356-357 (1997); *Salerno*, 481 U.S. at 748-751; see *Zadvydas* Gov't Br. 31-34, 46-47.

Respondent invokes (Br. 19) the Court's observation that in the context of civil commitment, "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," and that civil commitment statutes have been sustained "when they have coupled proof of dangerousness with proof of an additional factor such as 'mental illness' or 'mental

abnormality.'" *Hendricks*, 521 U.S. at 358. But of course neither the Attorney General's taking of an alien into custody upon the filing of removal charges, nor the retention of dangerous criminal aliens in custody during removal proceedings and pending their actual removal, is civil commitment under this Court's cases. It is an exercise of the United States' sovereign powers to expel or exclude aliens from the country. Furthermore, the detention of an alien in respondent's circumstances does not depend on a "finding of dangerousness, standing alone." *Ibid.* Under governing regulations, detention is based on the likelihood of future dangerousness (or flight), "coupled" with an "additional factor" (*ibid.*) of great significance—the entry of a final order or removal, which terminates any right of the alien to be at liberty in the United States. Nothing in *Hendricks* or related cases undermines the power of Congress to authorize the Attorney General to detain an alien who is under a final order of removal in these circumstances.

4. Moreover, the administrative procedures adopted by the Attorney General guard against detention that is not related to the concededly legitimate governmental interests that Section 1231(a)(6) serves. Those procedures afford an alien an ongoing opportunity to be released from detention by demonstrating that he would not pose a danger to the community or risk of flight if released. The current procedures are set forth in a regulation that was published by the Attorney General in final form on December 21, 2000, following notice and comment. See 65 Fed. Reg. 80,281-80,298 (to be codified at 8 C.F.R. 241.4 (reproduced at *Zadvydas* Gov't Br. App. 9a-26a)). (All subsequent citations are to this revised version of 8 C.F.R. 241.4). That regulation supersedes the regulation promulgated in 1997 that initially governed detention beyond the removal period under Section 1231(a)(6).

a. The procedures under the new regulation are modeled after those that, since 1987, have governed the detention or

release of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R. 212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. 8 C.F.R. 212.12. See *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) (upholding Mariel Cuban Review Plan against constitutional challenge). Like the Mariel Cuban Review Plan, see 65 Fed. Reg. 80,289, the new regulation provides for an automatic annual review of any alien who has been retained in custody and allows for more frequent reviews, initiated by either the alien or the INS, thus evincing INS's intent regularly to reconsider aliens for release, consistent with the interests in ensuring against flight and danger to the community. Compare *Hendricks*, 521 U.S. at 364 (upholding civil commitment of sexually violent predator as "only *potentially* indefinite" because the determination regarding commitment must be made annually, thereby demonstrating that the State does not intend a detainee to remain in custody beyond the period during which he continues to present a threat of dangerousness).

The new regulation also builds on several memoranda that were issued by the Executive Associate Commissioner of the INS in 1999 to provide guidance to field offices to supplement the initial 1997 detention regulation. See Gov't Br. 6-7, 11-12; *Zadvydas* Gov't Br. 40-46; *id.* App. 32a-39a. Those memoranda afforded significant additional protections and benefits to aliens who remained in custody under a final order of removal. During the period from February 1999, when the first of those memoranda was released, through mid-November 2000, "approximately 6,200 aliens [were] provided custody reviews by district directors * * * to determine whether detention of the alien beyond the 90-day removal period is warranted." 65 Fed. Reg. at 80,285. "Of those aliens, approximately 3,380 were released." *Ibid.* Both the Third and Fifth Circuits endorsed that interim

framework for custody reviews in rejecting constitutional challenges to detention beyond the removal period under Section 1231(a)(6). *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 399 (3d Cir. 1999) (INS's interim procedures "provide[d] reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States); *Zadvydas*, 185 F.3d at 287-288.[7]

b. The new regulation transfers authority from district directors (where the decisionmaking authority rested under the old regulation) to an INS Headquarters Post-Order Detention Unit (HQPDU), see 8 C.F.R. 241.4(c)(2) and (k)(2)(ii), patterned after the unit that has reviewed Mariel Cuban cases for the past decade, see 8 C.F.R. 212.12. That centralized Headquarters review separates the responsibility for continued custody determinations from the responsibility for conducting the removal proceedings themselves, and provides for expertise and uniformity of treatment in reviewing the detention of aliens throughout the country.

The HQPDU will ordinarily conduct a custody review during the first three months of detention under Section 1231(a)(6) or as soon thereafter as practicable. 8 C.F.R. 241.4(k)(2)(ii).[8] The panel will provide the alien with 30 days' notice of its review. *Ibid.* It will first conduct a records review; if the alien is not released based on that review, he is entitled to an interview by a two-member panel designated to make recommendations to the Executive Associate Commissioner. 8 C.F.R. 241.4(i)(1), (2) and (3). The alien may be accompanied by a person of his choice at the interview. 8 C.F.R. 241.4(i)(3)(i), (ii). An alien also is entitled to submit to the panel any written information that supports his release. 8 C.F.R. 241.4(i)(3)(ii). If the two panel members disagree, a third reviewer is added to vote on the release decision. 8 C.F.R. 241.4(i)(1). The panel will provide a written recommendation that includes a brief statement of the factors the panel deemed material to its recommendation. 8 C.F.R. 241.4(i)(5). The Executive Associate Commissioner will then make the final release determination based on the criteria in the regulation and all relevant information. If an alien is not released from custody by that decision, his case is automatically reviewed within approximately one year of such a decision. 8 C.F.R. 241.4(k)(2)(iii). In the meantime, an alien may submit a written request (not more than once every three months) to the HQPDU for release based on a material change in circumstances. *Ibid.*. The HQPDU, in its discretion, may also review a detainee at shorter intervals. 8 C.F.R. 241.4(k)(2)(v). A copy of any decision to release or detain an alien must be provided to the detained alien, and a decision to retain custody must briefly set forth the reasons for the continued detention. 8 C.F.R. 241.4(d).[9]

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[7] As the INS also explained when it promulgated the new regulation in December 2000, "[t]he experience of the Cuban Review plan concretely demonstrates that these procedures provide sound decision making for both the Government and the alien." 65 Fed. Reg. 80,285. Since the inception of that plan in 1988, "parole has been granted in over 7,000 cases (some of these may be the same individuals who are reparoled)." *Ibid.*

[8] An initial review, typically conducted by the district director, will be conducted even before the 90-day removal period expires and responsibility is transferred to the HQPDU. 8 C.F.R. 241.4(c)(1), (h)(1), and (k)(2)(*i*). The purpose of that initial review is to afford an opportunity for immediate release, without the need for more elaborate procedures, if it appears from the available information that the alien does not pose a danger to the community or a flight risk. In preparation for the review, the alien is provided access to his INS A-file, which contains all written custody recommendations and decisions, as well as material relevant to the alien's immigration history generally and information regarding his criminal history. 65 Fed. Reg. 80,286, 80,290. The INS also will provide the alien with a list of available pro bono or low-cost legal representatives who may assist the alien in the process. *Id.* at 80,284.

[9] Respondent's amici allege (Catholic Legal Immigration Network Inc., et al. (CLINIC) Br. 7-10, 14-21) that there have been inadequacies in particular cases in the past that would be inconsistent with the procedures described in the text under the new regulation. As amici recognize (CLINIC Br. 8-9), however, some of those problems arose because of confusion about the eligibility of some aliens for release under the mandatory detention provisions of AEDPA, the transition period custody rules that

c. Respondent's amici note that the foregoing procedures do not include all of the features of the pretrial-detention and civil-commitment schemes that have been upheld by this Court. See Catholic Legal Immigration Network, Inc., et al. (CLINIC) Br. 7-29; ACLU Br. 13-17. Unlike the individuals in those cases, however, respondent has been adjudged to have no legal right to be in the United States. That core component of his liberty interest thus has already been extinguished under procedures that concededly satisfy due process. Furthermore, as we have already explained, great deference is due the Attorney General's implementation of the congressionally vested authority over detention of criminal aliens beyond the removal period.

In any event, a number of the specific objections by respondent (Br. 21) and his amici (CLINIC Br. 10-24; ACLU Br. 5, 13-16, 23) were addressed by the INS when it promulgated the final regulation on December 21, 2000. For example, the new regulation no longer includes the "clear and convincing" evidence standard that aliens had to meet in order to be released under the old regulation and review process. Instead, it provides that the Attorney General may release an alien "if the alien demonstrates to the satisfaction of the Attorney General or [his] designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of

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were in effect during the first two years after IIRIRA was enacted, and then Section 1231(a)(6). See Gov't Br. 32-33, 39; see also *Zadvydas* Gov't Br. 25-26 & n.12. Throughout those periods, the INS endeavored to ensure fair implementation of the program, including development of the interim guidelines in 1999 to regularize custody review timing and procedures, and to remedy some of the problems cited by amici, while the permanent regulation was being developed. Many of amici's complaints date from before those interim procedures were implemented, and all, of course, date from before the December 21, 2000, effective date of the new regulation. They accordingly furnish no basis for concluding that implementation of the new regulation adopted on December 21, 2000, will fail to afford adequate protection to respondent and other aliens.

flight pending such alien's removal from the United States." 8 C.F.R. 241.4(d)(1). The INS also made clear that the regulation does not preclude consideration of the length of time that a detainee has been in immigration custody and the fact that the alien cannot be returned to his country of origin. 65 Fed. Reg. 80,288. And the INS expressed its intent to establish additional pilot projects in the next year to develop supervised release alternatives to detention for aliens under final orders of removal, based on the results of a recently completed study by the Vera Institute of Justice. *Id.* at 80,291.

The INS declined to adopt the suggestion by some commenters that custody determinations be made outside of the INS, pointing to the success of the analogous Mariel Cuban Review Plan. 65 Fed. Reg. 80,284-80,285 (citing *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955) (rejecting constitutional challenge to use of INS special inquiry officer in deportation proceeding)). The INS emphasized, however, its agreement that specific training is needed for the INS officers who will be making custody recommendations and determinations, noted that such on-going training is provided to the members of Cuban Review Panels, and assured that training "will be maintained and routinely monitored with the implementation of the final rule." *Id.* at 80,284.[10]

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[10] Amici also raise challenges to the conditions of various detainees' confinement. CLINIC Br. 27-30; ACLU Br. 22-23. They cite (CLINIC Br. 25, 28) an investigation by the Justice Department's Civil Rights Division of the use of excessive force against immigration detainees at the Jackson County, Florida, correctional facility. As amici note, INS detainees were held in the jail only until 1998. We have been informed by the INS that it withdrew its detainees from the facility when serious allegations of abuse were substantiated even before the investigation began. Moreover, as amici acknowledge, the INS has recently issued written standards to govern all facilities that house INS detainees in direct response to complaints about conditions of confinement. See Detention Operations Manual (2000). The INS's highest detention priority is the "safe, humane, and secure confinement of illegal aliens." *Id.* at 1; cf. *Flores*, 507 U.S. at 301.

d. Because the new regulation adopted by the INS on December 21, 2000, has not been applied by the INS to respondent, there is no occasion for this Court to consider its application to respondent or others in his position. If the Court reverses the Ninth Circuit's holding that the Attorney General has no statutory authority to detain such aliens—and further holds that the detention does not violate substantive due process—the INS should be given the opportunity to decide in the first instance whether respondent should be returned to and retained in custody under the new regulation. If respondent is detained after that review—and is not removed from the country in the meantime—the district court could entertain any challenges to the INS's procedures and the decision it rendered in a new petition for a writ of habeas corpus at that time.[11]

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JANUARY 2001

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[11] Respondent's lengthy argument (Br. 25-27) that he does not pose a danger to the community should not be accepted at face value. Respondent ignores, for example, the denials by an immigration judge of his bond requests during the pendency of his removal proceeding, based on findings about respondent's denial of his criminal actions, denial of his gang activity, lack of credibility about his drug abuse, and absence of any evidence of rehabilitation. See Gov't Br. 4-5 & n.3, 12 n.7. Moreover, contrary to respondent's suggestion (Br. 27), the dismissal of the assault charges referred to in our opening brief (at 12-13 n.7) does not mean that the INS would be required to ignore any evidence of conduct underlying those charges, to the extent it was credible and relevant to the issue of future dangerousness.

Dec 26, 2000

No. 00-38

IN THE

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Petitioners,

v.

KIM HO MA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS WATCH, HUMAN RIGHTS ADVOCATES, ET AL. IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTEREST OF THE AMICI CURIAE[1]

This brief is respectfully submitted jointly by Human Rights Watch, Human Rights Advocates, Center for Constitutional Rights, Jesuit Refugee Service, International Human Rights Law Clinic at Boalt Hall, U.C. Berkeley, Center for Human Rights & Justice, International Human Rights Law Group, World Organization Against Torture USA, and the Extradition and Human Rights Committee of the American Branch of the International Law Association in support of the Respondent Kim Ho Ma ("Ma").[2] Both parties have consented to the filing of this brief.

Amici are organizations that seek to protect the human rights of all persons, including persons held in detention by the Immigration and Naturalization Service ("INS"). Consistent with U.S. law and practice, *Amici* support the application of established international human rights norms in the United States.

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1 Pursuant to Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae or its counsel*.

SUMMARY OF ARGUMENT

This brief is filed in support of Ma's argument that he may not be detained indefinitely without charge or trial simply because no other country will accept him. Ma is not serving a criminal sentence nor has he been charged with a crime for which he is being detained. *Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000). While the United States is attempting to negotiate a repatriation agreement with Cambodia, there is no reason to believe that Ma's deportation is imminent or even likely in the reasonably foreseeable future. Ma's detention, therefore, violates the universally accepted prohibition against arbitrary detention.

It is a well-known doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. Accordingly, U.S. courts have demanded a clear expression of intent before they will conclude that Congress intended to supercede international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The statute under which Ma is being held, 8 U.S.C. § 1231(a), does not explicitly authorize the indefinite detention of a deportable alien who cannot be removed in the reasonably foreseeable future. Moreover, the statute contains no clear statement purporting to violate the international prohibition against arbitrary detention. Indeed, it can reasonably be interpreted to not authorize such detention. Therefore, the Ninth Circuit was correct when it refused to interpret 8 U.S.C. § 1231(a) as authorizing indefinite detention.

ARGUMENT

I.
MA'S DETENTION CONSTITUTES ARBITRARY DETENTION IN VIOLATION OF INTERNATIONAL LAW

Petitioners have argued that Ma should be detained pursuant to the legal fiction that his detention is reasonable and merely temporary – Ma's detention will cease once deportation has been effectuated. Before Ma was ordered released by the District Court, the INS continued to detain him even though the Government of Cambodia had refused all requests to provide travel documents for him. There is currently no repatriation agreement between the United States and Cambodia. Although the United States continues in its efforts to negotiate with Cambodia, it is unclear whether these negotiations will ever succeed. Ma's detention will continue as long as the United States and Cambodia are unable to resolve their differences. Accordingly, Ma could be detained for years. By the standards of national and international law, Ma has been subjected to arbitrary detention.

Few concepts are more fundamental to ordered liberty than the right to be free from detention in the absence of incarceration pending trial or other disposition of a criminal charge. This basic principle of human rights can be traced to the seminal document on personal liberty and civil governance – the *Magna Carta*. Drafted in 1215 to check the abuse of power manifested

by the English monarchy, the *Magna Carta* proclaimed that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."[3] Since its affirmation in the Magna Carta, the prohibition on arbitrary detention has limited the unfettered power of governments to detain individuals. It has been affirmed in national constitutions throughout the world, including the *United States Constitution. U.S. Const. amend. V.* Equally significant, it has been recognized by virtually every multilateral and regional human rights instrument of the twentieth century.[4]

The Universal Declaration of Human Rights is the most well-recognized and respected elaboration of international human rights norms of the twentieth century. Universal Declaration of Human Rights, G.A.

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3. As noted by Blackstone in his *Commentaries on the Laws of England*, this provision alone merited the title of the Great Charter. William Blackstone, IV *Commentaries on the Laws of England* 424 (photo reprint. 1978) (1783).

4. U.S. courts consult a variety of sources to determine the status of international law, including multilateral and regional agreements, decisions of national and international tribunals, statements of international organizations, the recorded expertise of jurists and commentators, and other sources reflecting the approval of the international community. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

Res. 217A (III), U.N. Doc. A/810 at 71 (1948). While the Universal Declaration is not a treaty obligation, it is recognized to embody the rules of international law in the realm of human rights. *See generally* Jordan Paust, *International Law as Law of the United States* 246 (1996). Article 9 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." According to the *travaux préparatoires*, the term "arbitrary" was added for both practical and historical reasons - the "legal" atrocities perpetrated by Nazi Germany were of too recent origin to permit the acceptance of a provision that would allow governments to detain individuals unjustly. Even an arrest or detention implemented pursuant to an existing law could be categorized as "arbitrary" if it was unjust.[5] Accordingly, the prohibition against arbitrary detention is meant to protect individuals against both illegal and unjust laws.[6] *See generally* Parvez Hassan,

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5. During the drafting of the Universal Declaration, a delegate from the United Kingdom indicated that "[t]he article would lose greatly if that word were deleted. There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights." 3 GAOR, Pt. I, Third Comm. 247, 248 (1948).

6. *Arbitrary Arrest, Detention and Exile* 7 (1964). Accordingly, "[a]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person." Id.

The Word "Arbitrary" As Used in the Universal Declaration of Human Rights: "Illegal" Or "Unjust?" 10 *Harvard International Law Journal* 225 (1969).

The International Covenant on Civil and Political Rights ("Covenant on Civil and Political Rights"), adopted in 1966, formally codifies many of the rights set forth in the Universal Declaration of Human Rights.[7] International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. The United States ratified the Covenant on Civil and Political Rights in 1992.[8] Article 9(1) provides that "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." According to the *travaux préparatoires*, the term "arbitrary" means far more than "illegal." Deprivations of liberty provided for by law must not be manifestly disproportionate, unjust, or

7. As of January 1, 2000, there are 144 States Parties to the Covenant on Civil and Political Rights.

8. In December 1998, President Clinton forcefully reasserted the U.S. commitment to the Covenant by issuing Executive Order, No. 13107, 63 FR 68991 (Dec. 10, 1998). According to Section 1(a) of the Executive Order, "[i]t shall be the policy and practice of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the [Covenant on Civil and Political Rights] . . . ."

unpredictable.[9]

The Human Rights Committee, established to monitor compliance with the Covenant on Civil and Political Rights, has stated that Article 9 is applicable to all deprivations of liberty. Human Rights Committee, General Comment No. 8 (1982). Furthermore, the Human Rights Committee has indicated that "arbitrariness" is not meant to be equated exclusively with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, or disregard for due process of law. *Womah Mukong v. Cameroon*, Communication No. 458/1991 (10 August 1994), U.N. Doc. CCPR/C/51/D/458/1991). In numerous cases, the Human Rights Committee has found that states committed arbitrary detention by detaining individuals who had already served and completed their prison terms. In *Ana Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977 (3 April 1980), U.N. Doc. CCPR/C/OP/1 at 45 (1984), for example, the Human Rights Committee found that Uruguay violated Article 9(1) when it detained two individuals for several months after their original prison sentences had been fully served. *See also Nqalula Mpandanjila et al. v. Zaire*,

9. According to Manfred Nowak, "[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily." Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993).

Communication No. 138/1983 (26 March 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986).

Several other human rights bodies have affirmed the prohibition against arbitrary detention. For example, the Working Group on Arbitrary Detention was established by the United Nations in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards, including Article 9 of the Covenant on Civil and Political Rights. *See* U.N. Commission on Human Rights Res. 1991/42. The Working Group has indicated that cases where individuals are kept in detention after their sentences are completed constitutes arbitrary detention. *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997). The Working Group is particularly aware of the unique situation faced by immigrants and asylum seekers that are held in prolonged administrative custody. Accordingly, the Working Group has identified a series of principles to govern the detention of immigrants and asylum seekers. *Report of the Working Group on Arbitrary Detention,* U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999). In particular, Principle 6 provides that the decision to detain an immigrant or asylum-seeker "must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law." Principle 7 adds that "[a] maximum period should be set by law and the custody may in no case be unlimited or of

excessive length."[10] *See also Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1999/63 (Dec. 18, 1998) (Immigrants and asylum seekers are "[n]ot to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations."); *Report of the Working Group on Arbitrary Detention,* U.N. Doc. E/CN.4/1998/44 (Dec. 19, 1997) ("[T]he following issues require to be addressed . . .(b) The need to provide for a limited period of detention, if not already provided by legislation, and the necessity of applying the restrictive period, where provided for, strictly, to ensure that the detention is not prolonged unreasonably.").

In May 1997, the Working Group considered a case of immigration detention in the United States. *Decisions and Opinions Adopted by the Working Group on Arbitrary Detention* U.N. Doc. E/CN.4/1998/44/Add.1 (Nov. 3, 1998). Three Cuban nationals had been detained for over ten years as immigration detainees even though they had not been convicted of a crime. The Working Group determined "that their detention is without any legal basis. It is also in contravention of articles 9 and 10 of the Universal Declaration of Human

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10. In a recent report on the status of immigrants and asylum seekers in the United Kingdom, the Working Group indicated that "[a]n absolute maximum duration for the detention of asylum seekers should be specified in national law." *Report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers*, U.N. Doc E/CN.4/1999/63/Add.3 (Dec. 18, 1998).

Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights." Id. Accordingly, the Working Group concluded that the deprivation of liberty was arbitrary. Furthermore, it requested the United States "to take the necessary steps to remedy the situation, and bring it in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights." *Id.*

The United Nations High Commissioner for Refugees ("UNHCR") has also condemned the arbitrary detention of immigrants. Recognizing that refugees are a particularly vulnerable group, the UNHCR has urged states to differentiate refugees from other aliens and, in particular, to not subject refugees to indefinite detention when travel documents cannot be acquired.[11] *See, e.g.*, UNHCR Executive Committee Conclusions Nos. 7 (1977), 44 (1986), and 82 (1997). Indeed, the UNHCR has condemned the arbitrary detention of asylum-seekers, refugees, and other aliens who are stateless or cannot be returned to their countries of origin. Recent UNHCR Guidelines elaborate upon this critical issue.

The inability of statelesspersons who have

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11. By definition, a refugee is an individual who maintains a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social or political group. *Convention Relating to the Status of Refugees*, 19 U.S.T. 6259, TIAS No. 6577. It is not surprising that refugees may face difficulties in acquiring travel documents from their countries of origin.

left their country of habitual residence to return to their countries has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

See UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Refugees* (Feb. 10, 1999). These Guidelines especially stipulate that "being stateless and therefore not having a country to which automatic claim might be made for the issuance of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release." *Id.*

The prohibition against arbitrary detention is recognized in each of the regional human rights agreements, which further affirms the universality of this fundamental norm. *See* American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, at art. 7(3) ("No one shall be subject to

arbitrary arrest or imprisonment");[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, at art. 5(1) ("Everyone has the right to liberty and security of the person.");[13] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, at art. 6 ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.").[14]

The well-regarded European Court of Human Rights has interpreted the prohibition against arbitrary detention as set forth in Article 5(1) of the European Convention quite broadly. According to the European Court, every deprivation of liberty must be lawful.[15]

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12. As of January 1, 2000, there are 26 States Parties to the American Convention on Human Rights. The United States has signed but not ratified the American Convention.

13. As of January 1, 2000, there are 41 States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

14. As of January 1, 2000, there are 52 States Parties to the African Charter on Human and Peoples' Rights.

15. Indeed, the European Court noted in *Soering v. United Kingdom* that excessive, long-term detention may well constitute a violation of the prohibition against torture and inhuman or degrading treatment or punishment. *Soering v. United Kingdom*, 11 E.H.R.R. 439 (1989).

Kemmache v. France, 19 E.H.R.R. 349 (1995). In turn, lawfulness implies conformity with the substantive and procedural rules of domestic law. It also implies the absence of arbitrariness. "In a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as lawful." *Id.* at 359. Thus, the purpose of Article 5(1) is to protect individuals from arbitrariness. While Article 5(1)(f) of the European Convention authorizes the detention of individuals for purposes of deportation and extradition, the European Court has placed careful restrictions on this power. In *Quinn v. France*, 21 E.H.R.R. 529 (1996), for example, the European Court stated that detention pending extradition cannot exceed a reasonable time.

> It is clear from the wording of both the French and the English versions of Article 5(1)(f) that deprivation of liberty under this sub-paragraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5(1). Id. at 550.

The Court determined that detention for a period of 18 months constituted arbitrary detention in violation of Article 5(1).

In its own statements before international tribunals, the United States has argued that arbitrary

detention violates international law. For example, the United States argued before the International Court of Justice that arbitrary detention is contrary to fundamental international norms. Significantly, the International Court of Justice agreed. "[T]o deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 42, at para. 91.

In its annual Country Reports on Human Rights Practices, the U.S. Department of State has identified and condemned numerous instances of arbitrary detention throughout the world. In its 1998 report on Turkey, for example, the State Department noted the continuing problem of arbitrary arrest and detention. U.S. Department of State, II *Country Reports on Human Rights Practices for 1998* 1551 (1999). While the Turkish Constitution specifies the right to speedy arraignment and trial, "judges have ordered that a significant number of suspects be detained indefinitely, sometimes for years." Id. Similar findings were noted in numerous other countries, including Bangladesh, Bolivia, Brazil, Egypt, Panama, Paraguay, and Russia.

U.S. courts have repeatedly held that arbitrary

detention violates international law.[16] *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d 689, 717 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988). *See also Xuncax v. Gramajo*, 886 F. Supp. 162, 184-185 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

As noted by the authoritative *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987) ("*Restatement (Third)*"), "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged, arbitrary detention. . . ." In turn, "[d]etention is arbitrary if it is not pursuant to law; it may be arbitrary also if "it is incompatible with the principles of justice or

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16. Foreign courts have made similar determinations. In *Katrina Marie Akers v. The Minister of State for Immigration, Local Gov't and Ethnic Affairs*, 20 F.C.R. 363 (1988), for example, an American citizen was detained by Australian authorities for several months pending her deportation to the United States. In reviewing the permissibility of her detention, the federal court of Australia for the Western Australia District indicated that "there is a growing recognition in international law that aliens or non-citizens may expect to have access to the same basic civil rights as enjoyed by nationals. The right of liberty is a precious right entitled to protection." *Id.* at para. 31. While Australian immigration law authorized the detention of non-citizens, the right to detain must serve "a limited purpose and no more, namely, for such period as is reasonably required to enable the Minister to consider whether a deportation order should be made." *Id.* at para. 32.

with the dignity of the human person." [citation omitted]." *Id.* at § 702 cmt. (h).

In sum, few international norms are more clear and fundamental than the prohibition against arbitrary detention, which extends to individuals in immigration proceedings. It is codified in the Covenant on Civil and Political Rights, an agreement ratified by the United States, and is well-established under customary international law.

II.

FEDERAL STATUTES MUST BE INTERPRETED IN LIGHT OF INTERNATIONAL LAW

In the present case, the statute under which Ma is being held, 8 U.S.C. § 1231(a), does not explicitly authorize the indefinite detention of a deportable alien who cannot be removed in the reasonably foreseeable future. Moreover, the statute contains no clear statement purporting to violate the prohibition against arbitrary detention.[17] In the absence of a statute that clearly and unequivocally states an intention to supersede the prohibition against arbitrary detention, this Court should interpret the statute consistent with our Government's obligations under international law.

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17. Indeed, U.S. ratification of the Covenant on Civil and Political Rights, coupled with Executive Order, No. 13107, suggests the contrary – the United States is fully committed to the protection and promotion of human rights and fundamental freedoms.

See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804);*Weinberger v. Rossi*, 456 U.S. 25 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983).

It is a well-known doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible.[18] *Restatement (Third)* § 114. Indeed, U.S. courts have demanded an expression of clear intent before they will conclude that Congress intended to supercede international law in any of its statutes. *Restatement (Third)* § 115(1)(a). *See also* Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2nd ed. 1996); Paust, supra, at 107-108. This doctrine does not require courts to use international law as a means for overriding domestic law; rather, courts are urged to harmonize domestic and international law whenever possible.

This doctrine of statutory construction has a long history.[19] The Supreme Court's decision in *Talbot v.*

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18. The phrase "where fairly possible" derives from one of the principles of interpretation to avoid serious doubts as to the constitutionality of a federal statute. *See Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936); *Restatement (Third)* § 114 rpt. n. 2.

19. This doctrine is not unique to American jurisprudence. *See Ian Brownlie, Principles of Public International Law* 48-50 (4th ed. 1990). *See also Leroux v. Brown*, 138 Eng. Rep. 1119 (C.P. 1852); *Le Louis*, 165 Eng. Rep. 1464 (Adm. 1817).

Seeman, 5 U.S. 1 (1801) represents, perhaps, the first elaboration of this principle of statutory construction. In *Talbot*, Chief Justice Marshall indicated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43.

In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. In February 1800, Congress adopted the Non-Intercourse Act to suspend all commercial intercourse between the United States and France. Implementation of the Act was supplemented by instructions issued by the President. In July 1800, Captain Alexander Murray of the U.S. frigate Constellation captured the vessel Charming Betsy as it was bound for the island of Guadalupe, a French dependency. At the time of its capture, the Charming Betsy was owned by Jared Shattuck, a Danish burgher who had been born in the United States. Alleging a violation of the Non-Intercourse Act, Captain Murray confiscated the cargo and the vessel. Both the district court and circuit court declared the seizure illegal. On appeal to the U.S. Supreme Court, the principal issue was whether "the Charming Betsy was subject to seizure and condemnation for having violated a law of the United States?" *Id.* at 118.

Writing for the Supreme Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law.

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Id. at 118. In light of these principles, Chief Justice Marshall considered whether the Non-Intercourse Act applied to neutral vessels.

> If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words

> placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

Id. at 119. Determining that the Charming Betsy was the bona fide property of a Danish burgher, Chief Justice Marshall concluded that the Charming Betsy was not forfeitable even though it was employed in carrying on trade and commerce with a French island

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Since its elaboration in *Murray v. Schooner Charming Betsy*, this doctrine of statutory construction has been extended to apply to treaties, in addition to customary international law. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Supreme Court considered whether immigration restrictions adopted by Congress pursuant to the Chinese Restriction Act were inconsistent with a treaty entered into between the United States and China. In 1880, the United States and China entered into a treaty which regulated the rights of Chinese nationals to enter and remain in the United States. In 1882, Congress adopted the Chinese Restriction Act, which placed certain restrictions on the entry of "Chinese laborers." The Court had to determine whether Congress intended to violate the "stipulations of a treaty, so recently made with the government of another country." *Id.* at 539. Writing for the Court, Justice Harlan emphasized the importance of treaties and recognized the profound implications that arise when a country violates an international obligation.

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.
> Id. at 540.

Reviewing the treaty language and subsequent federal legislation, Justice Harlan refused to override the treaty absent explicit congressional authorization.

> When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the

> general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer.

Id. at 550.

Throughout its case law, the Supreme Court has emphasized that it will not interpret statutory provisions to conflict with international law, particularly in the absence of clear congressional intent, if any other construction is fairly possible. In *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), the Supreme Court considered whether a 1971 federal statute on employment discrimination superseded two agreements entered into between the United States and the Philippines, the 1947 Military Bases Agreement and the 1968 Base Labor Agreement. Writing for a unanimous Court, Justice Rehnquist reaffirmed the *Charming Betsy* doctrine.[20] Id. at 32. Accordingly, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required . . . ." *Id.* Reviewing the legislative history of

20. Justice Rehnquist did not distinguish between treaties and executive agreements for purposes of applying this doctrine of statutory construction.

the affected statute, Justice Rehnquist found no "support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at Unites States military bases overseas." Id. at 33. Accordingly, Justice Rehnquist concluded that the international agreements were not superseded by the subsequent federal legislation.

In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), the Supreme Court considered whether Congress had sought to override the provisions of the Warsaw Convention regulating international air travel by adopting the Par Value Modification Acts. Writing for the Court in an 8-1 ruling, Justice O'Connor indicated that "[t]here is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." Id. at 252. Justice O'Connor found it significant that Congress had not specifically referenced the Warsaw Convention in its deliberations concerning the Par Value Modification Acts.[21]

21. While Justice Stevens dissented from the Court's ruling, he did not disagree with Justice O'Connor's analysis of the *Charming Betsy* doctrine. Indeed, Justice Stevens reiterated the importance of ensuring that treaty interpretation in domestic courts does not violate the terms of the treaty. "Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 263 (Stevens, J. dissenting). *See*

"Legislative silence is not sufficient to abrogate a treaty. [citation omitted] Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention." Id. Accordingly, Justice O'Connor concluded that the treaty provisions remained enforceable in United States courts.

In one of the most recent elaborations of the *Charming Betsy* doctrine issued by the Supreme Court, Justice Scalia, joined by Justices O'Connor, Kennedy, and Thomas, reaffirmed the validity of this doctrine of statutory construction. *In Hartford Fire Insurance Co., v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting), the Supreme Court considered the extraterritorial reach of the Sherman Act. While the majority opinion did not address the *Charming Betsy* doctrine, Justice Scalia acknowledged and affirmed the relevance of this doctrine of statutory construction in his dissenting opinion.

It is relevant to determining the

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also Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

> substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. [citation omitted] Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.

Id. at 815. Accordingly, Justice Scalia indicated that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." Id

While this doctrine of statutory construction is steeped in the principle of comity, it is also influenced by foreign policy concerns. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963), the Supreme Court applied this doctrine to avoid negative foreign policy implications. Specifically, the Court refused to construe the National Labor Relations Act in a manner contrary to State Department regulations because such a construction would have foreign policy implications. The Court also relied on the fact that the proposed construction would have been contrary to a "well-established rule of international law." Id. at 21. *See also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

Finally, the *Charming Betsy* doctrine is guided by separation of powers concerns. It respects the constitutional roles of the Executive and Legislative branches of government in formulating foreign policy. It acknowledges the institutional capacity of the coordinate branches to indicate whether they seek to violate international law. Accordingly, courts will not question the commitment of the Executive and Legislative branches of government to international law unless such intent is clearly manifest in federal law. *Chew Heong v. United States*, 112 U.S. at 540. When faced with ambiguous statutes, the division of power among the federal branches is best served by interpreting such statutes so as not to violate international law.

This doctrine of statutory construction is not an historical anomaly or isolated extrapolation – it is a longstanding doctrine of statutory construction that has been affirmed by the U.S. Supreme Court in numerous decisions.[22] *See also Sale v. Haitian Centers Council, Inc.*,

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22. Significantly, the *Charming Betsy* also forms the basis of the constitutional avoidance doctrine of statutory construction.

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. [citation omitted] This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy* [citation omitted], and has for so long been applied by this Court that it is beyond debate.
>
> *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988). *See also* Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 *New York University Journal of International Law and Policy* 35, 38 (1997). This doctrine of statutory construction was also used by the Ninth Circuit in *Ma v. Reno*, 208 F.3d at 822.

509 U.S. 155 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448-449 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Brown v. United States*, 12 U.S. 110, 125 (1814).[23] It is based upon comity, a respect for other nations, and the law which binds the international community. It is influenced by the reality that violations of international law, unlike violations of purely domestic law, may have profound foreign policy

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23. Lower courts have also applied this canon of statutory construction on countless occasions. See, e.g., Cheung v. United States, 213 F.3d 82 (2nd Cir. 2000); Mojica v. Reno, 970 F. Supp. 147-152 (E.D.N.Y. 1997)Mojica v. Reno, 970 F. Supp. 147-152 (E.D.N.Y. 1997); United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982).

consequences. Finally, the Charming Betsy doctrine is guided by separation of powers concerns. Accordingly, courts should be particularly cautious when engaging in statutory construction that may affect U.S. compliance with its international obligations.

The statute under which Ma is being held, 8 U.S.C. § 1231(a), does not explicitly authorize the indefinite detention of a deportable alien who cannot be removed in the reasonably foreseeable future. Moreover, the statute contains no clear statement purporting to violate the international prohibition against arbitrary detention. Indeed, it can reasonably be interpreted to not authorize such detention. Accordingly, the Ninth Circuit's refusal to interpret 8 U.S.C. § 1231(a) as authorizing indefinite detention is consistent with long-standing practice.

CONCLUSION

For these reasons, *Amici* respectfully submit this brief and urge the Court to affirm the Ninth Circuit's ruling.

Dated: December 26, 2000

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APPENDIX

APPENDIX

STATEMENTS OF AMICI

Human Rights Watch is a non-profit organization that investigates and reports violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. Since its inception, it has taken a particular interest in advocacy on behalf of vulnerable groups including refugees, asylum seekers, migrants, the stateless, and the internally displaced. Human Rights Watch maintains a program dedicated specifically to research and advocacy on behalf of refugees and similarly situated persons, and has documented detention-related violations of their fundamental human rights in many countries, including the United States.

Human Rights Advocates is a non-profit California organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus curiae* before a number of U.S. courts, including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth

Circuits, and the California Supreme Court. Human Rights Advocates has also appeared before international fora including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The *Center for Constitutional Rights* ("CCR") is a legal and educational organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. A major focus of CCR's work is the protection of international human rights. CCR has successfully litigated many important international human rights cases, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995). CCR has also presented international human rights claims in such fora as the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United Nations Commission on Human Rights, and the Inter-American Commission on Human Rights. Another major focus of CCR's work is the protection of the constitutional rights of refugees and immigrants.

The *Jesuit Refugee Service* ("JRS") was established by the Society of Jesus in 1980 in response to the refugee crisis in Southeast Asia. JRS now works in more than 40 countries providing direct service and advocacy on behalf of refugees and

asylum seekers. JRS gives priority to those refugees who may have been forgotten and where other agencies may not be providing services. In this context, JRS works in several detention facilities in the United States, providing social services and pastoral care to immigration detainees. From this vantage, JRS has seen and understands the implications of detention, particularly indefinite detention, on those facing this uncertain future.

The *International Human Rights Law Clinic* ("Clinic") was founded at Boalt Hall Law School, University of California at Berkeley to educate and train law students about human rights norms and their application in domestic, regional and international fora. To that end, the Clinic engages in advocacy on behalf of individual asylum-seekers and on larger human rights projects to protect the rights of immigrants and other marginalized communities. The proper application of international human rights law, and particularly *jus cogens* norms, is of fundamental concern to our mission.

The *Center for Human Rights & Justice* ("CHRJ") is a collaborative project between the University of Washington School of Law and Seattle University School of Law. The CHRJ is an inter-university clinical program focusing on international human rights law, policy, and advocacy. Our board members have taught, written and advocated extensively on international law, human rights law, and immigration

law. The CHRJ seeks to train students to advocate on behalf of victims of human rights abuses in the United States and abroad. The CHRJ also serves as a versatile and dynamic source of assistance to organizations and individuals in the front lines of the human rights struggle. The CHRJ joins this amicus brief to support international legal norms, protect human rights, and advance the cause of justice.

The *Urban Morgan Institute for Human Rights* is centered at the University of Cincinnati College of Law. The Morgan Institute, founded in 1979, is the oldest of the law-school-based programs focusing upon the study and promotion of human rights law. The Morgan Institute places students with human rights groups around the world. The Institute also submits briefs to international and domestic courts in cases raising significant human rights issues.

The *International Human Rights Law Group* ("Law Group") is a non-profit public interest legal organization engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978, the Law Group provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. The Law Group's goals include the development and promotion of international legal norms, and Law Group advocates work closely with individuals and organizations world-wide to expand the scope of

human rights protections for men and women. To that end, the Law Group has represented individuals and organizations before national and international tribunals and has appeared as *amicus curiae* in numerous cases in the United States. The Law Group joins this legal brief to emphasize the international standards that are binding on this Court.

The *World Organization Against Torture USA* ("Organization") is a non-governmental human rights organization dedicated to the prevention of torture and other forms of cruel and inhuman treatment or punishment. Established in 1996, the World Organization Against Torture USA serves as the U.S. affiliate of a worldwide network of more than 200 groups monitoring human rights compliance by their own governments. The Organization monitors and reports on U.S. compliance with international human rights standards, monitors the status and treatment of refugees and asylum seekers in the United States, assists domestic civil rights and social justice groups in the United States in understanding and making more effective use of international human rights standards and mechanisms as they apply to domestic issues and needs, and works to improve human rights monitoring and enforcement mechanisms at the international level

.

The *Extradition and Human Rights Committee of the American Branch of the International Law Association* ("Extradition Committee") is comprised of individuals from the academic, public and private

sectors who have extensive experience in the field of international law and, specifically, human rights law.[24] Members of the Extradition Committee have taught subjects such as international law, human rights law, and foreign relations law and have written extensively in these fields. Furthermore, members of the Extradition Committee have participated in human rights litigation throughout the United States. The Extradition Committee has a longstanding interest in the development of international human rights law. It is committed to the international legal order, the rule of law, and the protection of fundamental human rights.

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24. The Extradition and Human Rights Committee is one of a number of committees of the American Branch of the International Law Association. The views expressed herein represent only those of the Extradition and Human Rights Committee of the American Branch of the International Law Association. Not all members of the Committee participated in this project.

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Supreme Court, U.S.
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In The

Supreme Court of the United States

JANET RENO,
Attorney General of the United States, et al.,

Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the immigration and constitutional law professors whose individual names appear at the conclusion of this brief. Many of us have written about the principles that the government invokes in this appeal. There may be disagreement among us about the scope of the government's authority to detain people who have never entered the United States, but all of us conclude that the immigration authorities may not detain lawfully-admitted resident aliens except during proceedings to determine their ability to remain here and for a reasonable period thereafter to effect removal, so long as removal remains a realistic possibility.

Amici therefore support affirmance, and write both to explain the origins and application of the government's power over non-citizens, and to place this case within the broader context of constitutional immigration law.

SUMMARY OF ARGUMENT

The bedrock guarantees of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States, "without

[1] Both Petitioner and Respondent have consented to the filing of this brief.

No counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amici Curiae* with the assistance of Margaret Dundon and Jason Weintraub, students at the University of California School of Law (Boalt Hall). No one other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of the brief.

regard to any differences of . . . nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Accordingly, a "final order of removal" (Pet. Br. 50) does not strip even an unlawfully admitted alien of the right to be free of unconstitutional detention. *Wong Wing v. United States*, 163 U.S. 228, 236-38 (1896).

Respondent Kim Ho Ma became a permanent resident of the United States after his lawful admission in 1985 when, at age seven, he fled here as a refugee from Cambodia. Ten years later, Mr. Ma was convicted of a crime for which he was sentenced to serve thirty-eight months, and this felony conviction may permit his deportation – if only some other nation can be persuaded to accept him. Mr. Ma is therefore one of thousands of "INS lifers" – lawfully-admitted resident aliens now held in what Justice Jackson correctly regarded as "executive imprisonment" because of "fear of future misconduct, rather than crimes committed." *Shaughnessy v. United States ex rel. Mezei* ("*Mezei*"), 345 U.S. 206, 218, 225 (1953) (Jackson, J., dissenting). Although the United States would now like to deport them because of past acts, it is unable to do so. Moreover, unlike most removable aliens, Mr. Ma and other lifers do not hold the keys to the prison in their own pockets; they simply cannot decide to go elsewhere.

Although the Constitution protects all those within our borders, the government also possesses broad power to determine who may enter the United States *ab initio*, and to detain those whom it rejects pending their eventual repatriation. *Mezei* marks the zenith of this power, but it was decided in a completely different context from

the case at bench and in any event is readily distinguishable. *Mezei* concerned an applicant who had left the United States for a significant period of time and whose subsequent entry was denied for national security reasons. In contrast, Mr. Ma entered after having been screened and admitted by the government as a legal resident, and he never left the country.

In attempting to justify Mr. Ma's indefinite incarceration, the government asks this Court to treat him as if he were a first-time applicant at our door, thus stripping him of his constitutional rights. Petitioners put it this way: "the heightened constitutional status" accorded Mr. Ma as a resident alien "no longer applies." Pet. Br. 50. But the government has the constitutional principle exactly wrong. All aliens within the United States are "persons" fully protected by the Fifth Amendment, and none more so than legally-admitted permanent residents. When the United States screened and admitted Mr. Ma, it relinquished its ability to treat him as someone outside of our territorial jurisdiction and outside of the protections of our Constitution.

Amici submit that neither logic nor precedent support the government's attempt to deny Mr. Ma the protections of the Fifth Amendment, and thus convert *Mezei* into a sweeping authorization of preventive detention. As a legally admitted permanent resident who has never left the country, Mr. Ma's constitutional status is that of a deportable alien living in the United States, not an inadmissible alien standing at the border. Indeed, this is perhaps the most basic, long-standing distinction in all of this Court's jurisprudence governing the treatment of aliens. Moreover, as we will show, the government's

interest in detaining people already screened and admitted to this country differs markedly from its stake in refusing to admit large numbers of first-time applicants for admission. The only doctrine that permits the government to treat non-citizens physically within our territory as if they had never been admitted is the "entry fiction," an often-criticized rule that has no application here. This Court should reject the government's invitation to extend that rule and effectively create a brand-new "exit fiction."

ARGUMENT

I. ALIENS WITHIN THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION, EVEN IN MATTERS RELATING TO THEIR REMOVAL AND DETENTION.

Mr. Ma was admitted into the United States as a refugee, became a lawfully admitted permanent resident, and never left. This Court has long held that aliens within our physical borders are persons within the meaning of the Due Process Clause. *See, e.g., Yick Wo, supra,* 118 U.S. at 369; *Wong Wing, supra,* 163 U.S. at 238. Concurring in *Wong Wing,* Justice Field stated the principle clearly:

> "The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . This has been decided so often that the point does not require argument." (*Id.* at 242; concurring and dissenting opinion).

Wong Wing controls here. In that case, the government defended a statute authorizing executive imprisonment of unlawful entrants for one year after the entry of a final order of deportation. This Court rejected this unwarranted assertion of power. Acknowledging the government's broad power over immigration and the permissibility of "temporary confinement . . . while arrangements [are] being made for their deportation" (*id.,* 163 U.S. at 235), the Court struck down the statute. Quoting *Yick Wo's* holding that the Fourteenth Amendment is "universal in [its] application to all persons within the territorial jurisdiction, without regard to . . . nationality," the Court continued:

> "[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and . . . even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law." (*Id.,* at 238).

Wong Wing, which involved an alien unlawfully in the United States, makes the instant case *a fortiori.* If the Due Process Clause protected Wong Wing against arbitrary detention, it must protect those like Mr. Ma – who were lawfully admitted to the United States – and that protection continues even after the entry of an order of removal, so long as Mr. Ma remains in the United States.

The *Wong Wing* principle informs the Court's jurisprudence no less today than a century ago. *See, e.g., Plyler v. Doe,* 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long

been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").[2]

II. THE PLENARY POWER DOCTRINE DERIVES LARGELY FROM THE EXECUTIVE'S SOVEREIGN INTEREST IN FOREIGN AFFAIRS, AN INTEREST THAT IS ABSENT HERE.

The government claims "plenary" power to incarcerate Mr. Ma by invoking the Executive's control over foreign affairs, from which the "plenary power doctrine" is largely derived. This foreign affairs interest, however, has little relevance in matters involving aliens like Mr. Ma whom the government has already screened and admitted to our country. It is difficult to discern any meaningful connection to foreign affairs in this case. See *post*, part II-B.

A. The Plenary Power Doctrine Was First Developed – And Is At Its Zenith – In Cases Involving "Excludable" Aliens

The "plenary power doctrine" originated in *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581 (1889). As relevant here, the doctrine is shorthand for the idea that because authority over immigration into the United States flows from sovereignty itself –

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[2] *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973) (Fourth Amendment: searches and seizures within the United States); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 490-91 (1931) (Fifth Amendment: takings clause); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1975) (Fifth Amendment: custodial interrogation).

particularly the need for the sovereign to control relations with other nations – decisions implementing the immigration power may receive deferential judicial review.[3]

As its name suggests, *The Chinese Exclusion Case* involved the Executive's exclusion of an alien at the border, treating him as a first-time entrant without constitutional status. The Court rejected the argument that a new statute violated Chae Chan Ping's rights as a "person" under the Fifth Amendment, reasoning that the exclusion of foreigners was an "incident of sovereignty":

> "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain

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[3] For descriptions of the plenary power doctrine, *see* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 864-69 (1989); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 854-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 256-78; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1632-50 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 550-60 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 14-18 (1984); Margaret Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Constit. L.Q. 1087, 1128-39 (1995); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 939-951 (1995).

> these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us." (130 U.S. at 606).

See also Ekiu v. United States, 142 U.S. 651, 660 (1892) (exclusion decisions of the Executive "are due process of law" as to "foreigners who have never been naturalized, *nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law.*" Emphasis added).[4]

With respect to excludable aliens, the zenith of the plenary power doctrine came in *Mezei,* where the Executive denied entry to a would-be immigrant for national security reasons, and then detained him because no other nation would take him off our hands. The Court, citing *The Chinese Exclusion Case,* found Mezei's detention lawful. It emphasized foreign affairs and national security

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[4] The plenary power doctrine has proved controversial, generating strong dissents throughout the entire history of its existence. *See, e.g., Fong Yue Ting v. United States,* 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) ("Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists"); *Mezei, supra,* 345 U.S at 226 (Jackson, J., dissenting) ("Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?"); *Jean v. Nelson,* 472 U.S. 846, 874 (1985) (Marshall J., dissenting) ("Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement").

concerns and Mezei's status as a new applicant for admission. *Mezei, supra,* 345 U.S. at 210-16.

Mezei, however, applies only to first-time applicants for admission. Although Mezei had lived in the United States previously, he abandoned his residence and left the country for what this Court termed "a protracted absence." *Id.* at 214. When Mezei decided to come back, he presented himself as a new immigrant, "armed with a quota immigration visa issued by the American consul in Budapest." *Id.* at 208. In short, he viewed himself and was viewed by the government and the Court as an applicant for initial entry.

The significance of Mezei's status as a new entrant is shown in *Kwong Hai Chew v. Colding,* 344 U.S. 590 (1953), decided the same Term, where the Court recognized the constitutional status of a merchant seaman who sought entry after a temporary absence at sea. When the government likewise sought to exclude him on national security grounds, things went quite differently. The Court insisted that his constitutional rights were greater than those of an unadmitted alien, saying:

> "This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status." (*Id.* at 602).

Kwong Hai Chew was therefore, "from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment." *Id.* at 600. But writing just a short while later for the majority in *Mezei,* Justice Clark was at pains to distinguish *Kwong Hai Chew* as a case

involving the constitutional rights of "continuously present resident aliens." In contrast, he explained, new applicants for admission such as Mezei, who are "no more ours than theirs," may be excluded and detained without a hearing. *Mezei, supra,* 345 U.S. at 213, 215-16. Thus, in the case now at bench, the government advocates a "*Mezei* result," shorn of all the limiting principles that informed that decision. *See* Pet. Br. 43 (citing *The Chinese Exclusion Case*). This assertion gives fresh meaning to Justice Jackson's prophetic warning that

> "Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere." (*Mezei, supra,* 345 U.S. at 226; dissenting opinion).

B. The Foreign Affairs Considerations That Might Support Detention of Excludable Aliens Are Not Present Here.

A constant theme of the Court's plenary power decisions is the relationship between the political branches' control over immigration and their ability to conduct foreign affairs. *See, e.g., INS v. Aguirre-Aguirre,* 526 U.S. 415, 424-25 (1999); *Fiallo v. Bell,* 430 U.S. 787, 796 (1977); *Kleindienst v. Mandel,* 408 U.S. 753, 765-67 (1972); *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 542 (1950); *The Chinese Exclusion Case, supra,* 130 U.S. at 604-07.[5] Yet, the foreign policy concerns that animated

[5] Many commentators have documented this relationship as well. *See, e.g.,* Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, 23, 289-91 (1972); Louis Henkin, *The Constitution*

Mezei and other cases involving the detention of excludable or inadmissible aliens are absent here. Here the alien was screened by immigration officials, admitted lawfully for residence, and he has remained in the United States and developed substantial ties with and in our society. Regrettably, Mr. Ma did not live up to our aspirations. His removal has been ordered in light of the government's proof, in an individualized proceeding, that he committed a felony. But according Mr. Ma his constitutional rights does not "leave an unprotected spot in the Nation's armor." *Kwong Hai Chew, supra,* 344 U.S. at 602. This is not a case where foreign nations threaten our sovereignty by forcing large numbers of would-be immigrants upon us.[6]

and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 HARV. L. REV. 853, 858-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 SUP. CT. REV. 255, 261-269; T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution,* 7 CONST. COMMENTARY 9, 12 (1990).

[6] Post-*Mezei* decisions upholding the detention of excludable aliens rest upon the claim – wholly inapplicable here – that detention is necessary to protect our nation from the influx of large numbers of unwanted immigrants. *See, e.g., Jean v. Nelson,* 727 F.2d 957, 975 (11th Cir. 1984) *aff'd,* 472 U.S. 846 (1985) (asserting that release of excludable aliens "would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back"); *Barrera-Echavarria v. Rison,* 44 F.3d 1441, 1448 (9th Cir.; en banc), *cert. denied,* 516 U.S. 976 (1995) (quoting *Jean*); *Gisbert v. U.S. Attorney General,* 988 F.2d 1437, 1447 (5th Cir. 1993) (same).

Neither is this a case, such as *Aguirre-Aguirre, supra,* 526 U.S. at 423-32, addressing the substantive ground for

Indeed, the government does not seriously advance *any* meaningful foreign policy consideration justifying unlimited detention of Mr. Ma. The only foreign policy argument the government even mentions in passing is an assertion that if it cannot keep Mr. Ma under lock-and-key for howsoever long it wishes, this "could be misinterpreted" by other nations "to imply that the United States believes that removal of the criminal alien is futile, contrary to the position of the United States, speaking with one voice through the Executive Branch." Pet. Br. 44. Respectfully, the record is bereft of any statement, under oath, by any Executive officer, suggesting that it is or ever was a principle of our foreign policy to hold resident aliens hostage until their countries of birth capitulate to our repatriation demands. Neither does the record indicate that an inability to detain Mr. Ma interferes with our nation's relations with Cambodia. Moreover, this newly-minted "justification" would seemingly support indefinite incarceration of all removable aliens, not just those labeled "dangerous," which appears to be counter to the government's claim of limited employment of the detention power.

Unable to present any meaningful foreign affairs evidence, Petitioners offer irrelevant diversion, repeatedly labeling Mr. Ma a former "gang member," whose past activities endanger the public safety, even though he has

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withholding deportation, where the question was whether the non-citizen's conduct in his home country was political or not. Here, the only grounds for deportation and detention relate to Respondent's past conduct wholly within the United States. Unlike *Aguirre-Aguirre*, the legal issue in the case at hand does not involve foreign affairs at all.

served "almost the maximum sentence that could be ordered based on his criminal record." Pet. Br. 2-4. But all this opprobrium only succeeds in demonstrating that this case has nothing to do with Executive primacy in foreign affairs, and everything to do with preventive detention *vel non*.

Amici submit that this Court marked the proper bounds of plenary power in *INS v. Chadha*, 462 U.S. 919 (1983). It refused to apply that doctrine where no significant connection to foreign affairs had been demonstrated. While noting the existence of the plenary power doctrine, the Court struck down a statute permitting a legislative veto of the Attorney General's decision to withhold individuals' deportations because Congress chose a constitutionally impermissible means to implement its power. *See id.* at 940-41, and S. Legomsky, *supra* note 5, at 299-303 (discussing *Chadha*).

III. NEITHER MR. MA'S STATUS AS "ORDERED REMOVED" NOR THE "ENTRY FICTION" SANCTION THE GOVERNMENT'S ATTEMPT TO TREAT MR. MA AS A FIRST-TIME APPLICANT FOR ADMISSION.

We have thus far noted that non-citizens who are present in the United States are protected by the Constitution, and that the plenary power doctrine applies much less forcefully to persons admitted to the United States than to people at the border seeking admission. The only recognized exception to this territorial distinction – the "entry fiction" – is a narrow doctrine not relevant here. This fiction does not permit the government to strip

persons like Mr. Ma of many of their protections under the Constitution and relegate them to the diminished status of first-time applicants for admission.

A. This Court Has Applied The Plenary Power Doctrine To Lawfully Admitted Permanent Residents To A Lesser Extent Than To Non-Citizens Seeking Admission.

Even in matters relating to their removal, aliens lawfully admitted to our country are treated differently than those at the border seeking first-time admission. The development of the plenary power doctrine makes this difference clear.

The Court's first application of the plenary power doctrine to aliens within our borders came in *Fong Yue Ting v. United States, supra,* where the majority said that the powers both to exclude and deport "rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." 149 U.S. at 713. The dissenting Justices, however, distinguished between Congress' power over admitted and non-admitted aliens, building upon *Yick Wo*'s statement of the general principle that constitutional rights protect all "within the territorial jurisdiction." *Yick Wo, supra,* 118 U.S. at 369. *See Fong Yue Ting,* 149 U.S. at 734-37 (Brewer, J., dissenting); *id.* at 746 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

Next came *Wong Wing, supra,* in which both the majority of the Court and the concurrence of Justice Field – who authored the opinion of the Court in *The Chinese Exclusion Case* – drew a sharp distinction between the

constitutional principles relevant to expulsion and to detention pending expulsion, even though Wong Wing was subject to a final order of removal. See *ante,* part I.

These ideas again flowered in *Yamataya v. Fisher,* 189 U.S. 86 (1903). Yamataya entered the United States, but was later arrested on the ground that she was a pauper and thus ineligible to become a permanent resident. The government insisted in *Yamataya* that its "plenary powers" trumped the Fifth Amendment, saying that deportation "merely enforces the withholding of the privilege of coming or remaining here[.]"[7] But writing for the Court, Justice Harlan rejected this argument, declaring that the Act *sub judice* must be interpreted to "bring [it] into harmony with the Constitution," and therefore must afford what we now call "administrative due process" in deportation proceedings. *Id.* at 101.

Ever since *Yamataya,* this Court has steadfastly enforced its commitment to protecting people who have developed social ties to this country by consistently adhering to the sharp distinction between aliens who have been admitted as permanent residents and those who have not. *See, e.g., United States v. Verdugo-Urquidez,* 494 U.S. 259, 271 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Leng May Ma v. Barber,* 357 U.S. 185, 187 (1958) ("our immigration laws have long made a distinction between those aliens who have come to our

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[7] *Id.* at 93 (reporter's summary of the argument of the government's counsel). Much the same argument is now recycled here, at Pet. Br. 43-44.

shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality").

Landon v. Plasencia, 459 U.S. 21 (1982), sharply illustrates this critical distinction. There, a resident alien briefly left the United States and was caught smuggling aliens upon her return. The government argued that she should be treated as if she were an "excludable" alien, much as it now does here. Pet. Br. 49-50. But in an opinion for eight members of the Court (and with Justice Marshall concurring), Justice O'Connor disagreed and held that although Plasencia's right to return to the United States could be determined in a process labeled "exclusion," she was nevertheless protected by the Due Process Clause. "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.* at 32; *see also Reno v. Flores*, 507 U.S. 292, 306-07 (1993) (detention of aliens during the deportation process must be measured by the Due Process Clause).

The Court in *Plasencia* thus determined that a permanent resident has a liberty interest protected by the Constitution even when she stands outside the physical boundary of our country, making it clear that even in matters relating to removal – matters in which the government asserts "plenary power" – resident aliens still enjoy substantial protections under the Fifth Amendment.

B. The Sole Exception to Territorial Standing – The "Entry Fiction" – Does Not Apply To Aliens Admitted as Permanent Residents.

The cases discussed above stand for the proposition that once a person has lawfully entered our country, and has been accepted into our midst, he is not treated in the same fashion as one arriving at the border for the first time, hat in hand, seeking admission. The sole exception to this principle is the "entry fiction," a peculiarity that applies *only* to aliens who have not yet been granted admission into the United States. In arguing that admitting Mr. Ma gave him some "heightened" status otherwise unavailable to other aliens (Pet. Br. 50), the government seemingly ignores the basic principle that all people, including aliens, are "persons" within the meaning of the Fifth Amendment. Admitting Mr. Ma to this country as a resident alien did not turn him into a "person;" rather, it terminated any ability to apply the "entry fiction," a narrow exception to the doctrine of general application of the Fifth Amendment.

Mezei makes this plain. There the Court emphasized that Mezei's "harborage at Ellis Island [was] not an entry into the United States." *Mezei, supra*, 345 U.S. at 213. Distinguishing *Kwong Hai Chew*, Justice Clark wrote for the Court that Mezei was merely "on the threshold of initial entry[.]" *Id.* at 212. What permitted this Court to uphold Mezei's detention was the legal fiction that he was outside of our country's territory while sitting at Ellis Island, and thus not yet entitled to the full protection of our Constitution.

Amici submit that time has not treated *Mezei* kindly,[8] and there are reasons to reconsider its holding, particularly in light of the last five decades of decisions about detention and due process.[9] It is unlikely that the five justices who formed the majority in *Mezei* could have foreseen the consequences of their ruling; *Mezei* has been invoked to uphold long-term detention of non-admitted aliens under procedures markedly different than those approved under this Court's later-developed due process framework. Further, *Mezei* was decided at a time of particular concern about national security.[10] Even so, this

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[8] *See* C. Weisselberg, *supra* note 3, at 985-86 n.267 (collecting authorities criticizing *Mezei*). Interestingly, though Mezei was excluded without a hearing due to claims of national security, the Attorney General later authorized a hearing. The hearing officers upheld the grounds for exclusion but recommended that Mezei nevertheless be released. The Attorney General followed that recommendation. *See id.* at 970-84.

[9] *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed"); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (individual held as unfit to stand trial cannot be committed for more than a reasonable period necessary to determine whether he will become competent in the foreseeable future).

[10] Mezei was denied an exclusion hearing, but this denial occurred because of the special circumstances of a narrowly-tailored exception, permitting the Executive to "exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest." *Mezei, supra*, 345 U.S. at 210-11. Those special and seldom-occurring concerns are not remotely present here.

Court need not overturn *Mezei* to conclude that Mr. Ma is entitled to the full protection of our Constitution. Quite simply, *Mezei* ought not to be extended to lawfully-admitted resident aliens.[11]

As well, the "entry fiction" adumbrated in *Mezei* exists solely to accommodate the Executive's grace in releasing applicant-aliens on "parole" for "humanitarian reasons" (8 U.S.C. § 1182(d)(5)(A)) pending their admission or their eventual repatriation. Parole eschews needless confinement during the review process. Accordingly, the entry fiction simply facilitates release on immigration parole and does not change an unadmitted alien's status; he constructively remains at the border seeking admission.[12] But the humanitarian purpose informing the entry

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[11] The government suggests that 8 U.S.C. § 1231(a)(6) should be applied identically to admitted and unadmitted aliens. *See* Pet. Br. 48. But that is not necessarily required. This Court has previously construed the former exclusion statute to require different procedures for resident aliens and first-time applicants for admission. *See Plasencia, supra*, 459 U.S. at 31-35 (alien's re-admission to the United States could be determined in an exclusion proceeding, though she would be entitled to greater process than owed a prospective new entrant); *Kwong Hai Chew, supra*, 344 U.S. at 600 (returning alien "is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien").

[12] *See Leng May Ma, supra*, 357 U.S. at 190 (immigration parole reflects "the humane qualities of an enlightened civilization" and refusal to apply the entry fiction "would be quite likely to prompt some curtailment of current parole policy – an intention we are reluctant to impute to the Congress"); *Mezei, supra*, 345 U.S. at 215 ("temporary harborage, an act of legislative grace, bestows no additional rights"); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) ("petitioner, although physically

fiction would be wholly disserved by accepting the government's invitation to create a new legal fiction – the "exit fiction,"[13] perhaps – and using that fiction to establish a lacuna in the law, a place where the Fifth Amendment somehow does not fully apply.

The entry fiction therefore does not serve the government in this case. The Executive may certainly insist that an immigration parolee gain no legal advantage by virtue of this generosity, but that is poles apart from allowing the government to create a new "exit fiction" for resident aliens, simply because it is frustrated in its ability to repatriate a person whom it has lawfully admitted but cannot presently remove. The government's proposal should be rejected under the principles of *Yamataya*, *Wong Wing* and *Plasencia*, each holding that a resident alien's prospective "deportability" does not strip him of his substantive and procedural rights as a "person" under the Fifth Amendment. This Court has never held that an order of deportation breaks a resident's continued physical presence within our borders, and the government cannot change things by the legerdemain it advances here. *Amici* submit that the government's proposed "exit fiction" is at least one fiction too many.

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within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate").

[13] *See* Order and Tentative Ruling, *Chea Phoeng v. Immigration and Naturalization Service*, No. Civ. S-98-1299 (E.D. Cal. May 21, 1999), at 10 (applying what the court termed the "exit fiction").

IV. THE PLENARY POWER DOCTRINE DOES NOT PRECLUDE JUDICIAL REVIEW OF THE GOVERNMENT'S REPRESENTATIONS REGARDING THE POSSIBILITY OF REMOVAL.

Amici respectfully submit that resident aliens have a liberty interest protected by the Constitution, and they may not be incarcerated indefinitely if removal cannot be accomplished. In *Wong Wing*, *supra*, 163 U.S. at 235, the Court validated "detention, or *temporary* confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens[.]" (Emphasis added). Detention may be justified only as a means to an end; surely it may not be justified if the end is beyond timely reach.

The government argues that deference is due when deportation cannot be effected because "the recalcitrance of another nation raise[s] the very type of serious questions affecting international relations and foreign policy that require such deference." Pet. Br. 44. As noted, foreign affairs are rarely if ever implicated in matters relating to removal of already-admitted resident aliens. See *ante*, part II. But even were it otherwise, courts regularly decide cases that affect international affairs. As this Court stated in *Baker v. Carr*, 369 U.S. 186, 211 (1962), not every case that "touches foreign relations lies beyond judicial cognizance." Foreign policy considerations did not, for example, prevent the judiciary from reaching the merits of claims concerning the Executive's refusal to impose trade sanctions (*Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986)), the Executive's interpretation of the Warsaw Convention (*Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984)), or

the validity of an Executive agreement ending the Iran hostage crisis (*Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981)).

Similarly, under the Alien Tort Claims Act[14] and the Torture Victim Protection Act of 1991,[15] courts have carefully examined the liability of former foreign officials for torture and similar violations of international law committed on foreign soil.[16] As well, the right to be free from prolonged arbitrary detention is found not solely in the Constitution; this protection is also supported by international law. For example, the International Covenant on Civil and Political Rights, which the United States has ratified, prohibits arbitrary detention *and* mandates judicial review.[17] Federal courts have recognized this "clear international prohibition" against prolonged and arbitrary detention in cases involving both overseas and domestic detentions.[18]

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[14] 28 U.S.C. § 1350.

[15] Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at note following* 28 U.S.C. § 1350.

[16] *See, e.g., Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 791-92 (9th Cir. 1996) (suit involving actions of former Philippine government officials); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-889 (2d Cir. 1980) (Paraguayan military personnel); *Paul v. Avril*, 901 F.Supp. 330, 335 (S.D.Fla. 1994) (former Haitian military ruler).

[17] International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 168, U.N. Doc. A/6316 (1967) at art. 9, para. 1, 4.

[18] *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985).

An alien has a clear interest in being free from detention pending removal when removal may not reasonably take place. Where, as here, a non-citizen alleges that his Executive incarceration amounts to impermissible punishment, courts must ask, at a minimum, whether there is a rational non-punitive purpose for the detention and whether it is excessive in relation to that purpose. *See United States v. Salerno*, 481 U.S. 739, 747 (1987); *Schall v. Martin*, 467 U.S. 253, 269 (1984). To weigh the claim that detention is necessary for the "non-punitive" purpose of effecting removal, courts can and must decide whether the prospects of removal are clear or ephemeral, even if such review may somehow touch on foreign affairs. Courts surely ought not be disabled from inquiring into the factual basis of the government's claim that removal may occur in the foreseeable future, as well as whether the nature of the government's claim has changed as detention has continued. These inquiries do not "interfere" with the Executive's negotiations with foreign nations. They are not inquiries into, or "second guessing" of, the bona fides of Executive negotiations with other nations. Rather, they simply inquire into the fact-bound question of the progress and prospects of those negotiations.

For this reason, the suggestion of inappropriate judicial second-guessing (Pet. Br. 43-44) is not well-taken. The actual determinations made by the district court in the case at bench represent a typical and limited scope of review. The government says that the processes of negotiating repatriation treaties are often sensitive and difficult matters. Pet. Br. 44. The courts below neither

disagreed with this assessment, nor criticized the Executive for proceeding at whatever pace of negotiations it deems appropriate or necessary under these circumstances. *Per contra*, the courts simply determined that the objective facts placed in evidence by the government justified the common-sense conclusion that Mr. Ma's deportation is not likely to occur very soon. This was not "second guessing" any more than was a Texas prison guard's conclusion, broadcast on a national radio program, that "everybody's got a release date here. Except INS."[19]

Accordingly, judicial review does not invade the Executive's turf in any inappropriate way. Indeed, the district court's conclusion was consistent with the principle – first expressed in *Wong Wing*, *supra*, and never doubted since – that so long as he remains within the territory of the United States, even a deportable alien remains entitled to the protections of the Fifth Amendment. The farther Mr. Ma stands from permissible "temporary confinement . . . while arrangements [are] being made for [his] deportation," (*Wong Wing*, 163 U.S. at 235), the greater is the government's burden to show an appropriate justification.

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[19] *This American Life, Immigration, Act Three: Man Without a Country.* (WBEZ Chicago radio broadcast October 13, 2000) *at* http:// www.thislife.org.

CONCLUSION

The judgment below should be affirmed.

Dated: December 26, 2000

Respectfully submitted,

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In The

Supreme Court of the United States

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Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The ACLU of Washington is the Washington State affiliate of the ACLU.

The ACLU believes, as this Court has recognized, that the Constitution forbids the government from imposing indefinite civil detention on an individual based solely on the government's assessment that the individual is dangerous. *See Foucha v. Louisiana*, 504 U.S. 71 (1992). This Court has explained that such detention "would . . . be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 83.

This case raises a constitutional issue that is of central importance to the ACLU: whether the Due Process Clause prohibits the Immigration and Naturalization Service (INS) from inflicting detention of potentially lifetime duration on a longtime resident alien who cannot be removed to his country of origin. The ACLU has represented detainees or provided legal assistance in virtually

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief are being lodged concurrently with the filing of this brief with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

every indefinite detention case across the country since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (IIRIRA), appearing as counsel or *amicus* in district courts and courts of appeals in the First, Third, Fifth, Ninth, and Tenth Circuits. In addition, in furtherance of its organizational view as to the constitutional limits on civil detention generally, the ACLU has often appeared before this Court in civil commitment cases. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992).

SUMMARY OF ARGUMENT

In this case, the INS defends a scheme that imposes potentially lifetime incarceration on longtime resident aliens who have been ordered deported, but who cannot be removed. INS detention decisions rest almost entirely on predictions of future dangerousness, which in turn are based on criminal convictions for which the detained aliens have already served their criminal sentences. Detainees are held in prison-like conditions (and in many cases, actual prisons), and bear the burden of proving their lack of danger to the INS in a non-adversarial release interview.

It is undisputed that the INS has a legitimate interest in detaining aliens ordered deported in order to effectuate their removal and to protect the public during that process. This Court has also held, however, that when detention is excessive to the government's legitimate regulatory purposes, it is unconstitutionally punitive. Aliens, even those with no right to remain in the United States, cannot be punished without a criminal trial. Thus, the

question before this Court is whether the kind of detention at issue here – indefinite, potentially lifelong incarceration of a deportable[2] alien based almost entirely on a prediction of future danger – constitutes unconstitutional punishment.

This brief does not address whether the INS continues to possess a legitimate interest in detention when removal is not reasonably foreseeable. Rather, in this brief, *amici* demonstrate that, even assuming that the INS continues to have a legitimate interest in detention under such circumstances, the INS's post-order detention scheme is unconstitutionally excessive in relation to that interest.

Amici will not repeat points already made in respondent's brief, namely, that even aliens who have been ordered deported have a liberty interest in freedom from physical restraint that is protected by the Due Process Clause; and that entry of a final order of deportation does not reduce a former lawful permanent resident alien to the same constitutional position as that of an alien at the border seeking initial entry. Instead, this brief makes three arguments. First, notwithstanding the government's contentions to the contrary, the INS's detention scheme authorizes potentially lifetime incarceration of deportable

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[2] *Amici* use the word "deportable" to refer to any alien who has been ordered removed after having effected an entry into the United States, as opposed to "excludable" aliens, who are ordered removed prior to having effected such an entry. Before the enactment of IIRIRA, "deportable" and "excludable" aliens were subject to removal from the United States through different proceedings – deportation proceedings and exclusion proceedings. Although IIRIRA replaced these two proceedings with one unified "removal" proceeding, the distinction between "deportable" and "excludable" aliens continues to have significance in terms of the degree of constitutional protection the two categories of aliens are afforded.

aliens who cannot be removed. Second, the INS's post-order detention scheme is more severe than any other civil detention scheme this Court has ever held to be constitutional. Third, the unprecedented severity of the INS's scheme is not excused by the fact that the detained individuals are aliens who have been ordered deported.

I. UNDER THE GOVERNMENT'S ARGUMENT, ALIENS WHO CANNOT BE DEPORTED CAN BE SUBJECTED TO A LIFE SENTENCE.

The government never admits to the consequence of its post-order detention scheme: potentially lifetime incarceration of aliens who cannot be deported. Instead, the government attempts to skirt the serious constitutional violation raised by the prospect of lifetime incarceration by claiming that the post-order detention of aliens like respondent is not "indefinite or permanent." Pet. Br. 49. The government relies on two factors to make its claim: the INS's continuing efforts to deport aliens like respondent, and the availability of periodic review procedures through which such aliens can seek possible release. *Id.* Neither of these factors, however, alters the fact that the "practical effect" of the INS's post-final-order detention scheme "may be to impose confinement for life." *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring).

The INS's implementing regulations do not recognize any limit on how long an individual can be detained. *See* Detention of Aliens Ordered Removed, 65 Fed. Reg. 80,281, 80,294 (Dec. 21, 2000) (to be codified at 8 C.F.R. 241.4). Nor do they limit the length of detention by conditioning continued detention on the foreseeability of

removal. *See id.* This means that the INS may indefinitely incarcerate aliens who have been ordered deported, *regardless* of how long it may take for them to be removed or whether removal is even possible. Neither an extended length of detention nor the remoteness of removal are sufficient, either separately or in combination, to prevent an alien's continued detention.

Indeed, the INS's release procedures do not require any inquiry into either of these two factors. *See id.* at 80,295-96 (to be codified at 8 C.F.R. 241.4(f)) (containing no reference to either length of detention or foreseeability of removal as relevant factors that should be considered in release decisions). As long as an alien is considered a potential danger, or even merely a flight risk, the INS is prohibited from releasing the alien. *See id.* at 80,295-96 (to be codified at 8 C.F.R. 241.4(e) & (h)(1)).[3] Moreover, because INS regulations merely permit – but do not *require* – release of aliens who demonstrate lack of danger or flight risk, even those aliens who pose *no* danger or flight risk could be incarcerated for the rest of their lives at the INS's discretion. *See id.* at 80,295 (to be codified at 8 C.F.R. 241.4(d)(1)) (INS decisionmaker "*may* release an

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[3] This Court is not faced with the question of whether the INS could constitutionally detain undeportable aliens if INS regulations provided for rigorous release procedures that required consideration of the likelihood of removal and the length of detention served. *Amici* submit that such a regulation would go a long way toward solving the problem of undeportable aliens. Mr. Ma would likely be released under such a regulation, because of the time he spent in INS detention and the lack of foreseeability of his removal, and this Court would therefore not be faced with the constitutional question it considers in this case.

alien if the alien demonstrates" that release "will not pose" danger or "significant risk of flight") (emphasis added).

II. THE INS'S POST-FINAL-ORDER DETENTION SCHEME IS MORE SEVERE THAN ANY OTHER CIVIL DETENTION SCHEME THIS COURT HAS EVER UPHELD.

The extremity of the INS's post-final-order detention scheme is particularly apparent when it is compared with other civil detention schemes upheld by this Court. This Court has never held to be constitutional a civil detention scheme that permits potentially life-long detention of an adult, except in the limited context of civil commitment – and then only upon a finding of *both* mental abnormality and danger. In addition, this Court has never upheld a detention scheme that is so procedurally deficient, so broad in its application, and so disproportionate to the regulatory purpose it is intended to accomplish. The INS's custody review procedures are so lacking in basic safeguards that they offer no meaningful assurance that the detention scheme will be properly applied or that individuals will be able to successfully challenge their erroneous detention. The scheme is not limited to particularly dangerous aliens, such as repeat offenders or those convicted of the most serious crimes. Rather, it applies as well to first-time offenders, to those convicted of relatively minor and nonviolent offenses, and even to individuals with no criminal records at all. Finally, detainees are incarcerated in prison-like conditions (and in many cases, actual prisons), a restriction on liberty that is disproportionately harsh in relation to the INS's regulatory purpose.

A. This Court Has Never Upheld Civil Detention of Unlimited Duration Except in the Context of Civil Commitment Upon a Finding of Both Mental Abnormality and Danger.

With only one exception – civil commitment of those who are both dangerous and possess a medically-certified mental abnormality – this Court has never upheld the kind of prolonged, potentially lifelong civil incarceration at issue here.

This Court explained the rationale for requiring time limits on regulatory detention in *Foucha v. Louisiana*, 504 U.S. 71 (1992), which struck down a Louisiana statute that authorized the potentially indefinite detention of an insanity acquittee based solely on a prediction of dangerousness. This Court rejected the government's argument that, "because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, . . . he may be held indefinitely." *Id.* at 82. As this Court explained, "[t]his rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill [but dangerous] . . . [and] would . . . be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 82-83.

Thus, it is only when an individual is *both* dangerous and has a mental illness or defect that would render him harmful to himself or the community that detention of indefinite duration has been found to meet the requirements of substantive due process. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness,

standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . . . [therefore] [w]e have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a mental illness or mental abnormality.") (citations and quotations omitted).[4]

In all other contexts where this Court has upheld regulatory detention, the detention has been time-limited. For example, this Court has never upheld immigration detention of deportable aliens except as a temporary means to effectuate deportation. *See Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (emphasizing that "temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid"). In *Carlson v. Landon*, 342 U.S. 524 (1952), this Court recognized the Attorney General's undisputed authority to detain aliens she determines to be dangerous *"during the pendency of deportation proceedings."* *Id.* at 538 (emphasis added). As this Court emphasized in a subsequent case, *Carlson* did not concern long-term detention, but only "whether an alien could be detained during the *customarily brief period* pending determination of deportability." *United States v. Witkovich*, 353 U.S. 194, 201 (1957) (emphasis added).

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[4] The governmental interest in the civil commitment context is two-fold: "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas*, 441 U.S. 418, 426 (1979).

More recently, in *Reno v. Flores*, 507 U.S. 292 (1993), this Court considered the INS's policy of maintaining custody of alien juveniles during the relatively brief period pending deportation hearings in their cases. Although the case did not involve detention in the sense of locked or barred cells – the alien juveniles were confined in licensed juvenile care facilities – this Court nonetheless noted the strictly limited duration of INS custody. "The period of custody [was] inherently limited by the pending deportation hearing, which [was required to] be concluded with reasonable dispatch to avoid habeas corpus." *Id.* at 314 (citations and quotations omitted); *see also id.* ("It [was] expected that alien juveniles [would] remain in INS custody an average of only 30 days.").[5]

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[5] Despite the government's suggestion to the contrary (Pet. Br. 49-50), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), does not support the constitutionality of indefinite post-order detention of undeportable aliens. First, *Mezei* was decided before this Court developed its substantive due process case law in decisions like *United States v. Salerno*, 481 U.S. 739 (1987), *Flores*, and *Foucha*, which applied the excessiveness test enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to the context of civil detention. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 997 (1995) ("Since *Mezei* preceded *Mendoza-Martinez* and *Jackson* [*v. Indiana*, 406 U.S. 715 (1972)], the Supreme Court did not judge Mezei's detention by the reasonableness standard."); *see generally id.* at 991-97. Second, *Mezei* involved the exclusion of an alien based on "danger to the national security." *Mezei*, 345 U.S. at 216; *see also id.* at 210 (noting that "Congress expressly authorized the President to impose additional restrictions . . . during periods of international tension and strife" and that such authority "continues in effect during the present emergency"). Finally, the analysis in *Mezei* began with and centered around Mezei's status as "an alien on the threshold of initial entry" who "stands

Similarly, in the pretrial detention context considered in *United States v. Salerno*, 481 U.S. 739 (1987), this Court held that the Bail Reform Act did not violate substantive due process in part because "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747; *cf. Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (requiring probable cause hearing before pre-trial detention under Fourth Amendment in part because of the "extended restraint of liberty" that even pre-trial detention constitutes). Likewise, the pre-trial juvenile detention statute considered in *Schall v. Martin*, 467 U.S. 253 (1984), passed constitutional muster because "the detention [was] strictly limited in time" (*id.* at 269); "the maximum possible detention" under the statute was "17 days." *Id.* at 270.[6]

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on a different footing" than "aliens who have once passed through our gates." *Id.* at 212; *see also id.* at 213 ("[n]either [Mezei's] harborage on Ellis Island nor his prior residence [in the United States] transform[ed] [that case] into something other than an exclusion proceeding."); *see generally* Brief of Law Professors as *Amici Curiae* Supporting Affirmance (citing to this Court's precedent concerning the long-standing distinction between excludable and deportable aliens, and distinguishing *Mezei* on this and other grounds).

Indeed, only four years after its decision in *Mezei*, this Court narrowly construed a statute placing conditions of supervision on deportable aliens who could not be removed, noting that "supervision of the undeportable alien may be a lifetime problem. In these circumstances, issues touching liberties that the Constitution safeguards, even for an alien 'person' would fairly be raised on the Government's view of the statute." *Witkovich*, 353 U.S. at 201.

[6] Even in a case involving detention during time of insurrection – an exigent circumstance not presented by the present case – this Court observed that prolonged detention might raise a constitutional question. In *Moyer v. Peabody*, 212 U.S. 78 (1909), this Court held that civil detention by a state governor during time of insurrection did not constitute a constitutional violation, while specifically noting that "it may be that a case could be imagined in which the length of the imprisonment would raise a different question." *Id.* at 85; *cf. Ludecke v. Watkins*, 335 U.S. 160 (1948) (denying habeas corpus challenge to removal under the Alien Enemy Act during time of war, but not specifically addressing question of whether a constitutional question would be raised by prolonged detention).

More generally, this Court has recognized that the length of detention is necessarily related to the purposes of detention, and that detention that is initially justified by a regulatory purpose may become so lengthy as to be excessive, and hence unconstitutional. In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court considered whether a criminal defendant who could not stand trial because of his incompetency could be indefinitely detained. This Court held that substantive due process required that "a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than *the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.*" *Id.* at 738 (emphasis added). After such a "reasonable" time period, "the State must either institute the customary civil commitment proceeding . . . or release the defendant." *Id.*[7]

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[7] Although the *Jackson* "reasonableness" standard has not been uniformly applied in the lower courts, *Jackson* still stands for the position that detention that is initially constitutional may require additional justification when it becomes unreasonably prolonged. *See generally* 3 Michael J. Perlin, Mental Disability Law § 14.16 (1989 & 1999 Supp.) (surveying post-*Jackson* cases);

Likewise, in *Salerno*, this Court carefully noted that its decision upholding the facial validity of a pre-trial detention scheme of limited duration was entirely consistent with the principle that "detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Salerno*, 481 U.S. at 747 n.4. Recognizing the constitutional significance of that reservation, the lower federal courts have interpreted *Salerno* to mean that substantive due process necessarily places a limit on the length of pre-trial detention.[8]

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see also Weisselberg, *supra* note 5, at 996 n.329 (noting that subsequent to this Court's *Jackson* decision, a number of states, as well as Congress, enacted statutes incorporating the Court's standard, and that courts in some other states "strictly limited the periods of commitment").

[8] *See, e.g., United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989) (post-*Salerno* holding that "[i]n determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision[ ] . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future"); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (holding that "we do not believe that due process can tolerate any further pretrial detention in this case."); *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1987) ("[T]he due process limit on the length of pretrial detention requires assessment on a case-by-case basis."); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly."); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986) ("In some cases, the evidence admitted at the initial detention hearing, evaluated against the background of the duration of pretrial incarceration and the causes of that duration, may no longer justify detention.").

B. The INS's Custody Review Procedures Lack the Minimal Procedural Safeguards Necessary to Prevent Erroneous Detention Decisions.[9]

Whenever this Court has upheld civil detention, it has been in the context of a scheme that contains rigorous procedural protections, including: placement of the burden of proof on the government to show that an individual should be detained; an impartial decisionmaker; and a full-blown adversarial hearing. By contrast, the INS's post-order scheme puts the burden of proof on the detainee to show that he should be released; places the release decision in the hands of INS officials rather than an impartial adjudicator independent of the INS; and provides for only a non-adversarial release interview rather than a full-blown hearing. Taken in combination, these procedural flaws often make it impossible for detainees to show that they qualify for release, even under the INS's standards.[10] *See generally* Brief of the *Amici Curiae* Catholic Legal Immigration Network, Inc., Florida Immigrant Advocacy Center, the National Association of Criminal Defense Lawyers, and the Asian Law Caucus in Support of the Judgment Below.

Unlike the INS's detention scheme, the adult pre-trial detention statute upheld in *Salerno* contained "a number

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[9] Because the district court and court of appeals did not rule on procedural due process grounds (*see* Pet. Br. 11 n.5), a procedural due process challenge is not before this Court. However, as in other substantive due process cases, the custody review procedures are relevant to determining whether the detention is excessive in relation to the governmental justifications.

[10] The flaws described in this section are present in the recently promulgated regulations as well as the prior release procedures under which Mr. Ma's custody was reviewed.

of procedural safeguards." *Salerno*, 481 U.S. at 742. Among other things, the detainee in *Salerno* could "request the presence of counsel at the detention hearing" before an impartial adjudicator (a federal judge); "testify and present witnesses in his behalf, as well as proffer evidence;" and "cross-examine other witnesses appearing at the hearing." *Id.* This Court specifically noted in its substantive due process analysis that the government was required to demonstrate by clear and convincing evidence that "no conditions of pretrial release can reasonably assure the safety of the community or any other person." *Id.* at 750.

As in the adult pre-trial detention context, in *Schall*, this Court upheld a statute which provided for civil confinement of juveniles and which contained rigorous release procedures. The statute in *Schall* imposed the burden of proving that detention was necessary on the state; required appointed counsel for the detainee; and envisioned a full-blown adversarial hearing within a maximum of three days after the initial detention. *See Schall*, 467 U.S. at 275-77. In addition, the detention decision was made by an impartial family court judge. *See id.* at 270. Likewise, in *Flores* – which concerned INS custody of alien juveniles pending deportation proceedings – the detention scheme provided for a custody hearing before an immigration judge. *See Flores*, 507 U.S. at 308 (noting opportunity to request hearing before an immigration judge, "a quasi-judicial officer in the Executive Office for Immigration Review").

In the civil commitment context as well, this Court has upheld detention when the review procedures are strong, and struck down detention when the procedures are weak. In ruling that the detention statute in *Hendricks*

was constitutional, for instance, this Court began its analysis by reviewing in detail the procedures that the government was required to follow to place an individual in civil commitment. *See generally Hendricks*, 521 U.S. at 352-53. These procedures included a full-blown trial before a state judge "to determine beyond a reasonable doubt whether the individual was a sexually violent predator." *Id.* at 353. As the Court observed, "[i]n addition to placing the burden of proof upon the State, the [civil commitment] Act afforded the individual a number of other procedural safeguards," including access to the assistance of counsel at public expense and "the right to present and cross-examine witnesses." *Id.*

In contrast, when this Court in *Foucha* struck down the continued detention of an insanity acquittee who was no longer mentally ill but still dangerous, it specifically referenced the procedural flaws of the detention scheme. The Court observed that the scheme was "not carefully limited," in part because "Foucha [was] not . . . entitled to an adversary hearing" and because "the State need prove nothing to justify continued detention . . . for the statute places the burden on the detainee to prove that he is not dangerous." *Foucha*, 504 U.S. at 81-82; *cf. Addington v. Texas*, 441 U.S. 418 (1979) (rejecting civil commitment statute on procedural due process grounds because statute only required a preponderance of the evidence standard of proof, and holding that due process requires a clear and convincing evidence standard).

Compared to the civil commitment procedures considered by this Court in *Hendricks*, or the detailed protections of the Bail Reform Act in *Salerno*, the INS's post-order custody procedures are clearly deficient. The custody reviews are conducted by INS officials rather than

an independent impartial adjudicator like the federal judge in *Salerno* or the state judge in *Hendricks* or even the immigration judge in *Flores*. Moreover, the custody review interview is non-adversarial, taking place solely between the detainee and the INS interviewers, and provides only for submission of written evidence. The detained alien does not have the right to appointed counsel at no cost, only the right to request the presence of counsel that he has retained himself. And, the burden is on the detainee to demonstrate that he poses no danger or flight risk and should therefore be released. Such a requirement stands in stark contrast to the Bail Reform Act or civil commitment statutes, both of which require the government to bear the burden of proof.[11] As a practical matter, the obstacles to meeting this burden are tremendous, especially because most INS detainees are incarcerated in facilities that provide no educational or rehabilitative services. *See infra* pp. 22-23. It is difficult to imagine how an individual who has been deemed dangerous by virtue of his past criminal record could ever

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[11] *See generally Addington*, 441 U.S. at 431-32 (outlining standards of proof of most states' civil commitment statutes). In only one context, the detention of insanity acquittees, is the burden placed on the detainee to show that he qualifies for release. This is so because an insanity acquittal "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." *Foucha*, 504 U.S. at 76 (citations and quotations omitted). "From these two facts, it [can] properly be inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." *Id.* As this Court observed in *Jones v. United States*, 463 U.S. 354 (1983), "insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." *Id.* at 370.

prove to the INS's satisfaction that he presents no risk of future danger.

C. The INS's Post-Order Detention Scheme Does Not Limit Detention to Only the Most Dangerous Aliens.

Unlike other civil detention schemes, the INS's post-order detention scheme is not limited to a small category of the most dangerous individuals. Rather, it applies to a wide range of deportable aliens, from the most serious recidivist and violent criminals, to first-time offenders and others convicted of relatively minor and nonviolent crimes.

By contrast, in upholding the constitutionality of other civil detention schemes which authorized detention based on a finding of dangerousness, this Court has relied in part on the fact that the schemes permitted the detention of only a small group of individuals. In the pre-trial detention context, for instance, this Court in *Salerno* held that "the incidents of pretrial detention [were not] excessive in relation to the regulatory goal Congress sought to achieve" because "[t]he Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes." *Salerno*, 481 U.S. at 747. The Court cited to 18 U.S.C. 3142(f) (1982 & Supp. III), the provision of the Bail Reform Act which limited pre-trial detention to cases involving "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *Id.* The Bail Reform Act further limits detention to only a subset of even these cases; to order detention, a judge is required to find, by clear and convincing evidence, that

no reasonable alternatives to detention would serve the governmental interests. *See* 18 U.S.C. 3142(e) (2000).

Similarly, in *Hendricks*, the civil commitment statute at issue was addressed to a "*small but extremely dangerous group* of sexually violent predators." *Hendricks*, 521 U.S. at 351 (citing and quoting Kan. Stat. Ann. 59-29a01 (1994)) (emphasis added). In fact, the petitioner in *Hendricks* had committed predatory sexual acts against several young girls and boys over the course of almost twenty years, and testified that "the only sure way that he could keep from sexually abusing children in the future was 'to die.' " *Id.* at 355 (citing and quoting record). In upholding the constitutionality of the Kansas statute, this Court specifically referenced the narrow group – sexually violent predators with mental defects – who could be detained under the statute: "[i]t . . . cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Id.* at 357 (citations omitted).

Far from being limited to a "small but extremely dangerous group" of deportable aliens, the INS's post-order detention scheme applies to individuals with a wide range of criminal convictions. The statute that governs post-order detention, 8 U.S.C. 1231(a)(6) (Supp. IV 1998), allows the INS to detain aliens who are removable under the enumerated provisions of 8 U.S.C. 1227(a)(1)(C), (a)(2), or (a)(4) (Supp. IV 1998). These provisions include individuals whose removal is based on: drug possession (8 U.S.C. 1227(a)(2)(B)(i) (Supp. IV 1998)); receipt of stolen property (8 U.S.C. 1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(G) (Supp. IV 1998)); fraud (8 U.S.C. 1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(M)(i) (Supp. IV 1998)); tax evasion (8 U.S.C.

1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(M)(ii) (Supp. IV 1998)); and offenses relating to counterfeiting (8 U.S.C. 1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(R) (Supp. IV 1998)).

Although the INS could have adopted a construction of the statute limiting its indefinite detention authority to only the most dangerous felons, it has not done so. *See* 65 Fed. Reg. at 80,294 (to be codified at 8 C.F.R. 241.4(a)); *also* Brief of American Association of Jews from the Former USSR et al. as *Amici Curiae*, Supporting Affirmance. The INS's post-order detention scheme thus permits the indefinite detention of undeportable aliens ranging from the most serious recidivist and violent criminals, to first-time offenders such as respondent who were sentenced to relatively short times in jail, to individuals convicted of non-violent offenses.[12]

The regulations also adopt an expansive view of danger, preventing the release not only of aliens who "pose a danger to the community or to the safety of other persons," but also of those who pose a danger merely "to property." 65 Fed. Reg. at 80,295 (to be codified at 8 C.F.R. 241.4(d)(1)); *see also* id. at 80, 296 (to be codified at 8 C.F.R. 241.4(f)(8)(iv) (requiring consideration of information probative of whether alien is "likely to . . . [p]ose a danger . . . to property").[13] Such a scheme stands in sharp

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[12] This problem would evaporate if, as *amici* believe, the circuit court correctly interpreted the statute as authorizing detention beyond the removal period for only a reasonable period of time, and thus not applying to individuals such as the respondent who cannot be deported within the reasonably foreseeable future.

[13] The scheme appears to authorize the indefinite detention of non-criminal aliens as well, given that both the post-order

contrast to the narrow civil detention schemes in *Salerno* and *Hendricks*, which were directed at a small set of particularly dangerous individuals.

D. The INS's Detention Scheme Imposes a Restriction on Liberty That Is Disproportionate to the Government's Legitimate Regulatory Purposes.

Post-order INS detainees are incarcerated in conditions that are often worse than those faced by convicted prisoners, even though restrictions on liberty far less severe than incarceration would better reflect the INS's regulatory goals. In upholding other detention statutes and schemes, by contrast, this Court specifically noted the fact that the restriction on liberty closely reflected the regulatory purpose involved.

For example, in the juvenile pre-trial detention scheme considered in *Schall*, this Court gave careful consideration to whether the conditions of detention were tailored to the governmental interest in protecting society, as well as to its *parens patriae* interest in protecting children.[14] Similarly, in *Salerno*, which concerned adult pre-

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detention statute and the INS's regulations apply to aliens who are removable for violating their non-immigrant visa status (*see* 8 U.S.C. 1227(a)(1)(C) (Supp. IV 1998)), and any other alien "who has been determined by the Attorney General to be a risk to the community or [a flight risk]." 8 U.S.C. 1231(a)(6) (Supp. IV 1998); *see also* 65 Fed. Reg. at 80,294 (to be codified at 8 C.F.R. 241.4(a)(2)).

[14] A detained juvenile could not, "absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals." *Schall*, 467 U.S. at 270. Instead, the detained child was placed "in either nonsecure or secure detention facilities." *Id.* at 271. "Nonsecure detention involve[d] an open facility in the community . . . without locks, bars, or

trial detention under the Bail Reform Act, this Court relied on the fact that pre-trial civil detainees were required to be "housed in a 'facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.' " *Salerno*, 481 U.S. at 748 (quoting and citing 18 U.S.C. 3142(i)(2) (1982 & Supp. III)).

Civil commitment cases provide another context in which the detention schemes upheld by this Court have provided for conditions of confinement that reflect the government's regulatory purpose. In *Hendricks*, this Court upheld a statute which required that detainees be "placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals." *Hendricks*, 521 U.S. at 368. The statute also provided for treatment when appropriate. *Id*; *see also Jones v. United States*, 463 U.S. 354, 354 (1983) (civil commitment statute required commitment to a state-run mental institution).

Similarly, in *Reno v. Flores*, 507 U.S. 292 (1993), which concerned the custody of alien juveniles pending deportation proceedings, this Court gave careful consideration to whether the conditions of confinement reflected the government's regulatory purpose. The Court noted that the juveniles were not confined "in the sense of shackles, chains, or barred cells," *id.* at 302, but rather were placed

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security officers where the child receives schooling and counseling and has access to recreational facilities." *Id.* Even in "secure detention," moreover, children "[wore] street clothes provided by the institution and [partook] in educational and recreational programs and counseling sessions run by trained social workers." *Id.*

in licensed juvenile care facilities. *Id.* at 298 (noting that these facilities were "not correctional institutions").[15]

In contrast with other civil detention schemes, under the INS's post-order scheme, detainees are incarcerated in conditions that are often far worse than those they faced when serving their criminal sentences. The majority of detainees are housed in facilities that were not intended for long-term civil detainees, such as state and county jails or prisons.[16] These facilities are not required to provide educational or rehabilitative services of any kind.[17]

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[15] These facilities provided "an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure time activities, family reunification services, and access to religious services, visitors, and legal assistance." *Flores*, 507 U.S. at 298.

[16] *See* Julie Sullivan, *Illegal Immigrants Are Dumped Into a Secretive Prison Network*, The Oregonian, Dec. 10, 2000, at A1 (describing the INS's "haphazard network" of public and private prisons with "conditions considered severe even by prison standards.").

[17] The INS recently published a Detention Operations Manual that outlines various modifications to the conditions of confinement for all INS detainees. Even under the new standards, INS detainees continue to be incarcerated in prisons or prison-like conditions. In addition, although the new standards require that INS detainees not be excluded from any work programs that are available at the facilities where they are held, the standards do not require that any such programs be provided in the first instance. Moreover, the standards do not provide for any other kinds of rehabilitative services, including educational programs. Finally, the standards will not even apply to most state or local jails – where the overwhelming number of undeportable aliens are confined – for another two to three years. And, because the INS refused to issue the standards as regulations, it remains unclear to what extent they will be enforceable. *See generally* Detention Operations Manual

As a result, it is difficult for detainees to make the showing of rehabilitation that is often necessary for them to obtain release. *See* 65 Fed. Reg. at 80,295-96 (to be codified at 8 C.F.R. 241.4(f) & (f)(4)) (stating that, in making release decision, INS official "should . . . weigh[ ]" "[e]vidence of rehabilitation . . . where available"); *see also id.* at 80,295 (to be codified at 8 C.F.R. 241.4(d)(1)) (detained alien must "demonstrate[ ] to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or a significant risk of flight").

Restrictions far less severe than incarceration would better reflect the INS's stated regulatory goals of ensuring availability for removal and protecting society pending that process. Section 1231(a), the statute governing the detention and release of aliens with final removal orders, specifically provides for release of undeportable aliens under conditions of supervision – an alternative that more closely reflects the governmental justifications in this case while taking into consideration the liberty interest of aliens who cannot be removed. *See* 8 U.S.C. 1231(a)(3) (Supp. IV 1998) (authorizing continued supervision of aliens who "do[ ] not leave or [are] not removed within the removal period," and directing the Attorney General to promulgate regulations requiring, *inter alia*, periodic appearances before an immigration officer, submission to psychiatric evaluations, and other reasonable restrictions on conduct that the Attorney General prescribes); *see also* 8 C.F.R. 241.5 (2000) (implementing statutory mandate, and enumerating possible restrictions on release).

(Detention Standards) (2000), *available at* http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm.

Congress has also expressly provided for criminal penalties when an alien violates his conditions of supervised release, and when a released individual refuses to appear for removal, fails to make timely application for travel documents, or otherwise engages in conduct that obstructs removal. *See* 8 U.S.C. 1253(b) (Supp. IV 1998) (authorizing imprisonment of up to one year); 8 U.S.C. 1253(a)(1) (Supp. IV 1998) (authorizing imprisonment of up to four or ten years, depending on whether the alien is an aggravated felon).[18]

III. THE SEVERITY OF THE INS'S DETENTION SCHEME IS NOT JUSTIFIED BY THE FACT THAT THE DETAINED INDIVIDUALS ARE ALIENS WHO HAVE BEEN ORDERED DEPORTED.

The government excuses the harshness of the INS's scheme by pointing out that this case involves aliens who have been ordered deported, and by referencing the plenary power of Congress to enact immigration statutes and restrictions. However, regardless of whether this case involves aliens, due process prohibits civil detention when it is excessive in relation to the government's regulatory purpose. Neither of the two interests offered by the government – effectuating removal and protecting society

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[18] In addition, the criminal justice system of the states and the federal government are designed to implement the police power of protecting society, and apply equally to aliens and citizens. *Cf. Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

from dangerous aliens – is sufficient to justify a civil detention scheme so much harsher than any previously sanctioned by this Court.

The government incorrectly contends that, despite the harshness of the scheme, it passes constitutional muster because this Court must review it under a deferential standard due to the plenary power doctrine. While Congress's plenary power in the immigration sphere has been noted by this Court, it is not, as this Court has also recognized, without constitutional limit. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 35 (1982) (subjecting INS's procedures to due process scrutiny); *Wong Wing v. United States*, 163 U.S. 228 (1896) (finding plenary power doctrine not applicable to INS detention that was not for the purpose of effectuating removal). Here, because the likelihood of removal is so attenuated, the government's principal interest in continued detention is protecting the public against danger, an interest that is outside the realm of Congress's plenary immigration power.

A. The Government's Interests in Protecting Society and Effectuating Removal Do Not Justify Detention of Potentially Indefinite Duration.

Examination of each of the INS's justifications for post-final-order immigration detention – protecting society and ensuring removal – reveals that, contrary to the government's argument, neither of these purposes justifies a detention scheme so much harsher than any previously sanctioned by this Court. As discussed earlier, there is only one other context in which this Court has held that detention of indefinite duration passed due process scrutiny: the civil commitment context. *See supra* pp. 7-8. However, the governmental interest that has been found

to justify indefinite detention in the civil commitment context – the heightened police power interest that derives from the link between danger and the existence of a "mental illness" or "mental abnormality" (*see Kansas v. Hendricks*, 521 U.S. 346, 357 (1997)) – is wholly absent in the context of post-final-order immigration detention.

The first governmental interest put forth to justify post-final-order immigration detention – protecting society from dangerous individuals – is essentially the same in the civil commitment and post-final-order immigration contexts. From the perspective of the government exercising its police power to protect society, an individual is equally dangerous to society regardless of whether he is an alien or a citizen. Indeed, the government has never suggested that aliens with criminal convictions who have been ordered deported are any more dangerous than citizens with similar criminal convictions who are at liberty after completing their criminal sentences.

The second governmental interest put forth to justify post-final-order detention – effectuating removal of deportable aliens – is of an entirely different character than the governmental interest in civil commitment of a dangerous individual with a mental illness or mental abnormality. Central to this Court's holding that a mental illness or mental abnormality provides a sufficient basis for indefinite commitment when combined with dangerousness was the fact that a mental illness or mental abnormality "makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.* at 357. Thus, the police power is doubly implicated in such cases: a civilly committed individual is both dangerous and has an illness which makes him unable to control his dangerous behavior. In contrast, there is nothing about a

final order of deportation that makes an alien less able to control his behavior, and hence more dangerous, than any other individual who has completed his criminal sentence.[19]

B. The Governmental Interests in the Detention of Undeportable Aliens Are Not of the Kind That Implicate Its Plenary Power Over Immigration.

The government's contention that the plenary power doctrine requires this Court to exercise only deferential review of its post-order detention scheme fails to address the critical issue: the nature of the government's interest in the continued detention of an undeportable alien. *Amici* submit that, although the government's initial purpose in detention is the immigration purpose of effectuating removal, when removal is not reasonably foreseeable, the government's interest takes on a different character. At that point, the government derives its detention authority not from its immigration purpose but from the general law enforcement power of the federal government to protect the public against danger.[20] Because

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[19] If the government believes that an undeportable alien is mentally ill and dangerous, the government may always institute civil commitment proceedings. *See Hendricks*, 521 U.S. at 358; *Jackson*, 406 U.S. at 738.

[20] While the INS has the authority to detain dangerous aliens pending the removal process, this authority does not exist separately and apart from its immigration power to effectuate removal. The government misses the point when it states that the INS has a "distinct interest in protecting the community from aliens who are likely to cause harm if released." Pet. Br. 23. The fact that this interest may be "distinct" does not mean that it survives absent an interest in removal. Moreover, the government's citation to *Carlson v. Landon*, 342 U.S. 524 (1952),

detention for law enforcement – as opposed to immigration – purposes falls outside the sphere of plenary immigration power, it is not entitled to deferential judicial review.

This Court recognized the limits on the plenary power doctrine in *Wong Wing v. United States*, 163 U.S. 228 (1896), which held that Congress cannot enact an immigration statute that punishes aliens, even those with no right to reside in the United States, without a criminal trial. Congress has plenary authority to exclude and expel "undesirable aliens" and to impose "temporary confinement, as part of the means necessary to give effect to [deportation]." *Id.* at 235. However, "to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial." *Id.* at 238. The challenged provision in *Wong Wing* – which imposed confinement at hard labor for up to one year on aliens who had been ordered deported – was part of an immigration statute, the purpose of which was to promote Congress's policy of deterring and expelling certain classes of aliens.[21] Nonetheless, the Court held that there

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to support its point is misplaced. This Court made clear in *Carlson* that it was upholding the detention of dangerous aliens "pending deportation hearings." *Id.* at 544; *see also United States v. Witkovich*, 353 U.S. 194, 201 (1957) (noting that *Carlson* concerned "whether an alien could be detained during the customarily brief period *pending determination of deportability.*") (emphasis added).

[21] *See* H.R. Rep. No. 52-255, 52d Cong., 1st Sess. (1892), at 3-4 (noting that provision authorizing imprisonment at hard labor was intended to deter violations of the immigration law).

were limits on how Congress could accomplish its immigration policies.

Thus, when detention becomes too removed from the government's legitimate immigration purpose of effectuating removal, such detention passes out of the sphere of plenary immigration power and is entitled to no more deference than civil detention involving citizens. As this Court has recognized on numerous occasions, even aliens who are not lawfully present in this country are entitled to the protections of the Fifth and Fourteenth Amendments. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (equal protection guarantee of Fourteenth Amendment protects undocumented immigrant children); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (non-resident aliens are entitled to protection from unlawful takings under the Fifth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (equal protection guarantee of the Fourteenth Amendment extends to aliens). The INS's post-order detention scheme must therefore be carefully examined to determine whether it passes Constitutional scrutiny.[22]

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[22] Given that Congress did not expressly authorize in Section 1231(a)(6) the detention of aliens whose removal is not reasonably foreseeable, the INS's decision to authorize such detention in order to protect the public from danger may well exceed its delegated immigration power. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (striking down Civil Service Commission regulation which barred resident aliens from employment in the federal competitive civil service on the grounds that the Commission unconstitutionally assumed the authority that was not "properly the concern of that agency"); *see also Gegiow v. Uhl*, 238 U.S. 3 (1915) (Commission of Immigration exceeded his immigration power in refusing entry to aliens based on his assessment of the labor market of the city where the aliens may have planned to reside).

CONCLUSION

For all of the reasons set forth above, *amici* urge that this Court affirm the circuit court's ruling.

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IN THE

Supreme Court of the United States

JANET RENO, ET AL.,

Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT KIM HO MA

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INTEREST OF *AMICUS CURIAE*

The Lawyers Committee for Human Rights (the "Lawyers Committee") submits this brief *amicus curiae* in support of respondent Kim Ho Ma.[1] Since 1978, the Lawyers Committee has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee grounds its work on refugee protection in the international standards of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. The Lawyers Committee operates one of the largest and most successful pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, the Lawyers Committee provides legal representation, without charge, to hundreds of indigent asylum applicants each year. The Lawyers Committee and its volunteer attorneys currently represent some 900 clients from more than 60 countries. The Lawyers Committee is committed to ensuring that the remedy of asylum remains available to victims of persecution. It is particularly concerned that all eligible aliens have the opportunity to apply for asylum and to have their claims adjudicated through a fair and humane process.

This case raises an issue of particular importance to the Lawyers Committee and to its clients, who, under a ruling

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the Lawyers Committee, made a monetary contribution to the preparation and submission of this brief.

contrary to that reached by the Ninth Circuit here, might face indefinite and prolonged incarceration pending the resolution of their asylum applications or in circumstances in which the INS seeks to deport them to countries that will not accept them. Indeed, this question raises special concerns in cases in which a refugee's home country refuses to accept him or her back for reasons relating to the refugee's claimed need for asylum. In such cases, a rule permitting the INS to indefinitely detain such refugees may, in effect, permit the home country to inflict political persecution upon the refugee, using the INS as a proxy.

For these reasons, the Lawyers Committee for Human Rights has a profound interest in the outcome of this case.

SUMMARY OF ARGUMENT

This case, as with the companion case of *Zadvydas v. Underdown*, No. 99-7791, concerns the right of a resident alien to be free from arbitrary and indefinite imprisonment where that alien, for whatever reason, cannot be removed to his or her country of origin. Under this Court's well-established precedents, such resident aliens – who have "passed through our gates, even illegally," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) – are afforded full protections under the Due Process Clauses of the Fifth and Fourteenth Amendments. As this Court has held, "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). *See also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.").

In the decision below, the Ninth Circuit applied this principle in a straightforward manner to hold that the Immigration and Nationality Act could not constitutionally be construed to permit the indefinite detention of a resident alien unable to be returned to his or her native land. Avoiding the serious constitutional questions presented by a contrary interpretation, the court ruled that 8 U.S.C. § 1231(a)(6) simply could not be construed to grant the INS "so sweeping a power with regard to persons who are generally subject to the protections of the Constitution." *Ma v. Reno*, 208 F.3d 815, 827-28 (9th Cir. 2000). This holding is correct, and should unquestionably be affirmed by the Court.

The Lawyers Committee writes separately, however, to address one aspect of the Ninth Circuit's reasoning warranting special treatment here. In reaching its ruling, the Ninth Circuit distinguished the situation presented by Kim Ho Ma's case with those of so-called "excludable" aliens – *i.e.*, those who have not legally "entered" the United States, such as undocumented refugees seeking asylum. *See Ma*, 208 F.3d at 823-25. In *Mezei*, this Court held that such excludable aliens, who are "on the threshold of initial entry," stand "on a different footing" from those aliens "who have once passed through our gates." *Mezei*, 345 U.S. at 212. Indeed, the Court remarked bluntly: "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). Applying this minimal standard of procedural due process, the Court thus concluded that Mr. Mezei – an excludable alien deemed a risk to national security by the Government – could be detained indefinitely on Ellis Island, despite the Government's inability to return him to his country of origin. *Id.* at 215-16.

The Ninth Circuit's contrary holding with regard to the *deportable* alien at issue here obviously rests upon *Mezei*'s determination that resident aliens possess greater rights under the Due Process Clause than excludable aliens such as Mr.

Mezei. Indeed, this is aptly reflected in prior Ninth Circuit precedent following *Mezei* and concluding that refugees and other excludable aliens *could* be detained indefinitely in analogous circumstances (*i.e.*, where the country of origin – in that case, Cuba – refuses to take them back) – even where the incarceration has lasted upwards of 10 years and occurred in maximum security federal penitentiaries. *See Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc).

This *amicus* brief addresses the continuing viability of this sharp distinction between the constitutional rights of deportable versus excludable aliens with regard to prolonged, indefinite detention. To be sure, this Court need not reach this issue to affirm the Ninth Circuit's ruling here. But the Lawyers Committee submits that this case provides an appropriate and rare vehicle for the Court to reconsider the wisdom of the 50-year old *Mezei* precedent and its subsequent progeny holding that, for all intents and purposes, the INS has unlimited discretion to incarcerate excludable aliens for prolonged and indefinite periods, outside the glare of fundamental constitutional protections. And indeed, a reconsideration of *Mezei* is especially necessary given the subsequent development of international standards against arbitrary and indefinite detention, as well as this Court's more recent constitutional jurisprudence.

The Lawyers Committee for Human Rights, therefore, submits this Brief *Amicus Curiae* to encourage the Court not only to affirm the Ninth Circuit's ruling in this case, but also to reevaluate the constitutional protections afforded aliens generally with regard to prolonged indefinite detention.

ARGUMENT

The Ninth Circuit's decision should, without question, be affirmed by this Court. But in the process, the Court should revisit its McCarthy Era *Mezei* precedent and emphasize that the indefinite and prolonged imprisonment of *any* alien – whether excludable or resident – flatly contravenes international human rights guarantees against arbitrary detention and conflicts with evolving standards of constitutional jurisprudence.

I. Tracing The History Of *Mezei* And The Minimal Constitutional Protection Of Excludable Aliens Against Prolonged, Indefinite Detention

A. The Plenary Power Doctrine

The Court's decision in *Mezei* has its roots in the so-called "plenary power" doctrine, first applied by this Court in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the "*Chinese Exclusion Case*"). In that case, the Court ruled that a Chinese laborer who, in 1887, had obtained a certificate permitting him to re-enter the United States, could not challenge his subsequent exclusion from the country as a result of an 1888 statute voiding previously obtained certificates. As stated by Justice Field, Congress's ability to pass legislation to exclude aliens "is a proposition which we do not think open to controversy." *Id.* at 603. Thus, the Court concluded that the federal power to *exclude* aliens was an inherent attribute of sovereignty, essentially unchallengeable by the courts. *Id.* at 604, 609.

The Court reached a similar conclusion in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), again affirming the federal government's plenary power to exclude aliens, essentially without judicial intervention. As stated by Justice Gray, "[i]t is not within the province of the judiciary" to order the entry of foreigners who are not residents of the United States. For such people, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 660.

Since *Nishimura Ekiu*, the Court has adhered to this rule – courts will generally decline to intervene in cases involving the determination of whether a particular alien will be admitted or excluded from the country, except in specific instances authorized by statute or regulations. *See also Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("the right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance"); *see also generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 947-51 (1995) (discussing development of the plenary power doctrine).

Pointedly, however, the Court has not adhered to the extreme plenary power doctrine in cases involving resident or *deportable* aliens. Indeed, in *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (the "*Japanese Immigrant Case*"), the Court expressly recognized that resident aliens are entitled to procedural due process before being deported or expelled from the country. *Accord Kwong Hai Chew*, 344 U.S. at 596-97 (recognizing a resident alien's constitutional right to due process in deportation proceedings).

B. The "Entry Fiction"

In some sense, practical reality has blurred the distinction between deportable and excludable aliens. As discussed by Professor Weisselberg, "[b]y the late nineteenth century, it became impossible to complete all immigration inspections aboard vessels. Congress therefore passed several immigration laws to permit inspectors to order the 'temporary removal' of an alien from a vessel for inspection[.]" Weisselberg, *The Exclusion and Detention of Aliens*, 143 U. PA. L. REV. at 951. But these statutes explicitly specified that such a removal to land would not be deemed "a landing." *Id.* This was the beginning of the so-called "entry fiction," whereby "an alien on United States

soil pending admission would be treated as if she was still at the border, and not within the United States." *Id.*

Of course, in certain instances, such "removals" could extend for prolonged periods of time, especially where – as here – the alien could not be returned to his or her country of origin. The Court, however, determined that this prolonged removal did not change the excludable alien's constitutional status. In *Kaplan v. Tod*, 267 U.S. 228 (1925), for example, the Court ruled that an alien ordered excluded in 1914, but unable to be returned home because of World War I and then placed with local charities in the United States, could not challenge her subsequent exclusion in 1923. As stated by the Court in rejecting her claim that she had effected an entry into the United States, "[s]he was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.* at 230 (citing *Nishimura Ekiu*, 142 U.S. at 661).

Thus, in effect, the Court – and subsequently Congress[2] – determined that, regardless of an excludable alien's physical presence in the United States, such an excludable alien would still be deemed "at the boundary line" and not as having "entered" the United States. *Id. See also Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) (holding that even though alien is physically "within the United States," there has not been an "entry" for the purposes of determining rights and protections under the law).

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[2] In 1952, Congress effectively codified the entry fiction expressly providing for immigration parole of aliens, and by providing that that such parole "shall not be regarded as an admission" into the United States. *See* Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at then 8 U.S.C. § 1182(d)(5)).

C. *Mezei*: The Cold War Culmination Of Plenary Power And The Entry Fiction

The immigration / national security cases decided during the McCarthy Era of the early 1950s – including *Mezei*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) – represent the "modern zenith" of the plenary power doctrine and the "entry fiction." Weisselberg, 143 U. PA. L. REV. at 954.

In *Knauff*, the Court affirmed the exclusion, on national security grounds, of the non-citizen wife of a naturalized citizen. The Court did so despite the fact that the Attorney General's decision to exclude the alien was based on secret evidence and without any opportunity for a hearing. *Knauff*, 338 U.S. at 544. Rejecting the alien's effort at admission, the Court stated emphatically that "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543. The Court further stated that, given that the "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government[,]" the Executive Branch's determination to exclude a particular alien is "final and conclusive." *Id.* at 542-43. Justice Jackson (joined by Justices Black and Frankfurter) dissented, specifically condemning the Government's use of secret evidence to exclude Ms. Knauff. As stated by Justice Jackson, "the plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." *Id.* at 551 (Jackson, J., dissenting). Nevertheless, and regardless of Justice Jackson's concerns about secret evidence, the Court deferred entirely to the Attorney General, affirming the exclusion of Ms. Knauff. In short, "[t]he rule of *Knauff* is that the government has absolute power to exclude. When an official claims that the

exclusion concerns the country's security, no court may examine the government's claim." Weisselberg, 143 U. PA. L. REV. at 957.[3]

Although it concerns *deportable* aliens (as opposed to the *excludable* aliens at issue here), *Harisiades v. Shaughnessy* stands as a further extreme example of the operation of the plenary power doctrine. In that case, the Court affirmed the deportation of the petitioners under the Alien Registration Act (8 U.S.C. § 137), on the sole grounds of former membership in the Communist Party. Rejecting the petitioners' due process challenge (as well as challenges under the First Amendment and the *Ex Post Facto* Clause), the Court concluded that the Government had broad authority to deport aliens for whatever reason, especially given the intense state of the Cold War. As stated by the Court, "[w]e think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation." *Id.* at 591. *See also Galvan v. Press*, 347 U.S. 522 (1954) (upholding congressional power to deport an alien who had lived in the United States for 30 years, but had briefly been a member of the Communist Party).

Mezei stands as the culmination and most extreme example of the Court's McCarthy Era jurisprudence of withdrawing judicial scrutiny from even the most egregious violations of basic rights. The alien in question, Ignatz Mezei, was a long-term resident who came to the United

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[3] As described by Professor Weisselberg, the Court's decision in *Knauff* "did not play in Peoria or on Capitol Hill." Weisselberg, 143 U. PA. L. REV. at 958. After numerous congressional hearings and condemnatory newspaper articles, the Attorney General consented to the reopening of Ms. Knauff's case and a full hearing, revealing all previously secret evidence. The Board of Immigration Appeals ultimately ordered Knauff to be admitted to the United States. *See generally id.* at 958-63.

States in 1923 and married an American citizen. In 1948, Mezei attempted to travel to Romania to visit his dying mother and, after being denied permission to enter Romania, lived in Hungary for nineteen months. *Mezei*, 345 U.S. at 207. In 1950, Mezei attempted to return to the United States, but was intercepted and temporarily excluded by an immigration inspector. Subsequently, the Attorney General determined that Mezei should be permanently excluded "on the 'basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.'" *Id.* at 208. In other words, the Government determined that Mezei should be excluded for unspecified "security reasons." *Id.* The Government then attempted to deport Mezei to Hungary, which refused readmission. *Id.* at 208-09. France and Great Britain also refused, as did a number of Latin American countries. *Id.*

Throughout this period, Mezei was held in detention at Ellis Island. In short, the Government would not admit or parole him into the United States, and no country would take him back. Thus, Mezei's detention on Ellis Island was utterly indefinite and, conceivably, permanent.

Mezei filed a petition for writ of habeas corpus, challenging his indefinite detention. The district judge granted Mezei's petition, holding that Mezei's 21-month detention on Ellis Island was "excessive and justifiable only by affirmative proof of [Mezei's] danger to the public safety." *Id.* at 209. The Second Circuit affirmed this ruling.

This Court, however, reversed. Determining Mezei to be an excludable alien, the Court emphasized that, with regard to exclusion decisions, an executive officer's authority is "final and conclusive." *Id.* at 212. Contrasting the situation involved with a resident alien, the Court noted that "[a]n exclusion proceeding grounded on danger to the national security . . . presents different considerations," such that the Government's continued, indefinite detention on Ellis Island was permissible and did not run afoul of due process.

Justices Black, Frankfurter, Jackson, and Douglas all dissented from the Court's ruling. Justice Black, joined by Justice Douglas, condemned the Court's decision as "holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General." *Id.* at 217 (Black, J., dissenting). As stated by Justice Black:

> No society is free where government makes one person's liberty depend upon the arbitrary will of another. . . . The Founders abhorred arbitrary one-man imprisonments. Their belief was – our constitutional principles are – that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.' This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.

Id. at 217-18.

Justice Jackson, joined by Justice Frankfurter, was even more explicit in his condemnation of the Court's ruling. Justice Jackson found it "startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial." *Id.* at 218 (Jackson, J., dissenting).

Nevertheless, and over these strong dissents, the Court – by a 5-4 vote – determined that Mr. Mezei's indefinite detention by the INS did not violate the Constitution.[4]

D. Application Of *Mezei* By The Lower Courts To Sanction Indefinite, Arbitrary, And Prolonged Incarceration Of Aliens

With some exceptions, the lower courts have generally applied *Mezei* to reject claims that the indefinite detention of excludable aliens or refugees violates the Constitution or exceeds the INS's power under the Immigration and Nationality Act, even outside the *Mezei* Court's original national security context. This has been true, regardless of the length of detention, the conditions of confinement, or the rationale for exclusion.

The most extreme example of this may be the Ninth Circuit's decision in *Barrera*. In that case, the petitioner had arrived in the United States in 1980 as part of the Mariel Cuban boatlift, during which approximately 125,000 Cubans came to the United States. From 1981-1983, Barrera was convicted of several crimes, and in 1985, after Barrera finished serving his state criminal sentences, the INS revoked Barrera's immigration parole and transferred him to the federal prison in Atlanta, where a number of Mariel Cubans were being detained at the time. Subsequently, the INS ordered that Barrera be denied admission and excluded from the country. Unfortunately, however, the Cuban government refused to take him back. Thus, Barrera became "an excluded alien whose deportation [was] not practicable." *Barrera*, 44 F.3d at 1443.

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[4] Mr. Mezei's detention ended up lasting approximately four years, before he was ultimately paroled into the United States under a special clemency measure. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 558 (1990).

The INS, however, did not restore Barrera's immigration parole status. On the contrary, and with the exception of a very brief period in 1992, the INS has held Barrera continuously from 1985 up through the present. And, throughout most of this period, Barrera has been held in maximum security federal penitentiaries at Lompoc and Leavenworth, and housed in the general population with hard-core criminals convicted of violent crimes, despite the fact that Barrera is not serving any criminal sentence.

In 1989, Barrera filed a petition for writ of habeas corpus, asserting that the Attorney General lacked the statutory authority to detain him indefinitely, given that his deportation would not be effected within the foreseeable future, and that this indefinite detention also violated the Constitution and international law. After the district court granted Barrera's petition, a panel of the Ninth Circuit affirmed. In an opinion by Judge Noonan, the court emphasized that "'[i]n our society no person may be imprisoned for many years without prospect of termination. The rights of the human person must be vindicated as part of the common good of our society.'" *Barrera*, 44 F.3d at 1452 (Pregerson, J., dissenting) (quoting Judge Noonan's majority opinion in the original panel decision).

An *en banc* panel of the Ninth Circuit reversed, however. Relying primarily upon *Mezei*, the court concluded that Barrera, as an excludable alien, had "no constitutional right to immigration parole and, therefore, no right to be free from detention pending his deportation." *Id.* at 1448. "Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows." *Id.* at 1450. The court also determined that Barrera's prolonged incarceration did not violate international law principles. *Id.* at 1450-51. Thus, in that case, the INS was deemed free to incarcerate an immigrant – conceivably for the rest of his life – in maximum security federal penitentiaries housed with violent criminals, for the simple reason that the INS was unable to deport him.

Other courts – primarily in the context of claims by Mariel Cuban detainees – have similarly concluded that, under *Mezei* (applying the plenary power doctrine and the entry fiction), excludable aliens have no right to be free from indefinite and prolonged incarceration pending deportation, even where the deportation is not feasible. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993) (relying on *Mezei* to reject claim by Mariel Cuban that indefinite detention violated substantive and procedural due process, as well as international law); *Fernandez-Roque v. Smith*, 734 F.2d 576, 580 (11th Cir. 1984) (finding that the government has implicit authority to detain excludable aliens indefinitely until deportation).

The lower courts' application of *Mezei* to permit indefinite incarceration of excludable aliens has not been unanimous, however. In *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), the Tenth Circuit ruled that such indefinite incarceration of a Mariel Cuban in federal penitentiaries violated the Constitution, as well as fundamental principles of international human rights law. As stated by the court, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." *Id.* at 1388 (citing Universal Declaration of Human Rights, Arts. 3 and 9, U.N. Doc. A/801 (1948)). *But see Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000) (distinguishing *Rodriguez-Fernandez* and concluding that indefinite detention of deportable alien did not violate the Constitution).

Nevertheless, and regardless of *Rodriquez-Fernandez*, most lower courts to consider the applicability of the *Mezei* principle to the indefinite and prolonged incarceration of excludable aliens have determined that, given the entry fiction and the plenary power doctrine, such indefinite detention does not violate the Constitution or international law.

II. The Court Should Reconsider The Viability Of *Mezei* In Light Of Evolving Standards Of International Law Proscribing Arbitrary Detention

As discussed in *Rodriguez-Fernandez*, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." 634 F.2d at 1388. In simple, unequivocal terms, the Universal Declaration of Human Rights states: "No one shall be arbitrarily arrested, detained, or exiled." Universal Declaration of Human Rights, Dec. 10, 1948, art. 9, U.N.G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). The American Convention on Human Rights (July 18, 1978, art. 7, 1144 U.N.T.S. 123 ("American Convention")) further provides that "[e]very person has the right to personal liberty and security . . . . No one shall be subject to arbitrary arrest or imprisonment." *See also* Restatement (Third) of Foreign Relations Law § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention").

This Court has consistently held that international law must be considered part of United States federal common law. As stated by the Court: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also The Nereide*, 13 U.S. (9 Cranch.) 388, 422 (1815) (holding that U.S. courts are "bound by the law of nations which is part of the law of the land"); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (it is a "settled proposition that federal common law incorporates international law"). Thus, it is beyond question that the international precepts against arbitrary detention are binding on the United States.

These evolving and yet fundamental principles strongly suggest the need to reconsider the *Mezei* line of authority, which apparently permits the indefinite detention of immigrants without charge or crime, conceivably for the rest

of their lives if they are unable to be sent home. Such untrammeled and absolute discretion to imprison human beings is the essence of arbitrary imprisonment.

The United Nations has defined "arbitrary" detention as detention that is "(a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person." United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* 7 (1964). Thus, it is clear that even if the indefinite detention of a particular alien is allegedly consistent with domestic statutory or regulatory authority, this purported "legality" does not, in and of itself, make such indefinite detention permissible under international law. *See* Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993) ("It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.").

Indeed, the Human Rights Committee, established to monitor compliance with the Covenant on Civil and Political Rights (ratified by the United States in 1992), has found "arbitrary" detention in violation of the Covenant and the Universal Declaration of Human Rights, even where such detention is purportedly pursuant to law. *See, e.g., Ana Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977 (3 April 1980), U.N. Doc. CCPR/C/OP/1 at 45 (1984) (finding violation of Article 9(1) of the Universal Declaration where two individuals were detained for several months after their sentences of imprisonment had been fully served). Moreover, the U.N. Working Group on Arbitrary Detention has noted that "arbitrary" detention occurs where, as in the case of many INS detainees, the person is "kept in detention after the completion of his sentence." *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4./1998/44 (1997).

The European Court of Human Rights has also analyzed the analogous circumstance of an individual held pending extradition. In *Quinn v. France*, 21 E.H.R.R. 529 (1996), for example, the European Court ruled that detention pending extradition cannot exceed a *reasonable* time:

> It is clear from the wording of both the French and the English versions of Article 5(1)(f) [of the European Convention for the Protection of Human Rights and Fundamental Freedoms] that deprivation of liberty under this subparagraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5(1).

Id. at 550 (finding 18 month detention to be a violation of the European Convention and its prohibition against arbitrary detention).

The United Nations High Commissioner for Refugees ("UNHCR") has recognized the serious human rights questions raised by the indefinite detention of asylum seekers, refugees, and other aliens who are stateless or cannot be returned to their countries of origin. As stated by the UNHCR:

> The inability of stateless persons who have left their country of habitual residence to return to their countries has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Refugees* (Feb. 10, 1999).

Thus, evolving international human rights law principles require a reconsideration of *Mezei*. As discussed by Justice Black in his dissent in *Mezei*, condemning the practice of indefinitely detaining immigrants who are unable to be returned home: "No society is free where government makes one person's liberty depend upon the arbitrary will of another." *Mezei*, 345 U.S. at 217 (Black, J., dissenting). Justice Black, joined by Justice Douglas, emphasized that under these fundamental principles, excludable aliens such as Mr. Mezei "should not be deprived of [their] liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor." *Id.* at 218.

The detention at issue is made all the more arbitrary and abusive by the practical reality that refugees and other excludable aliens are often held in prisons, housed in the general population with violent criminals. As discussed recently by Professor Michele A. Pistone, asylum seekers, for example, are often held in "state, local, and county jails, in which the INS rents bed space as needed." Michele A. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 204 (1999). As demonstrated in *Barrera* and other cases, some excludable detainees are even held in notorious maximum security federal penitentiaries, such as Lompoc or Leavenworth, together with our nation's most violent felons. *See Barrera*, 44 F.3d at 1443 (discussing Barrera's decade-long incarceration in USP Lompoc and other prisons). Furthermore, as discussed by Professor Pistone with regard to asylum seekers:

> Where asylum seekers are detained in centers that also house criminal inmates, the asylum seekers are typically not treated differently from the general prison population. Guards receive no special training about asylum seekers. Indeed, prison staff in many detention centers do not know which of the inmates under their guard are criminals and which are asylum seekers. With no way of distinguishing between the two subgroups of inmates, members of the two groups are often treated the same way – as criminals. They are subject to frequent strip searches, pat downs, and prolonged isolation in solitary confinement as punishment for minor infractions.

Pistone, 12 HARV. HUM. RTS. J. at 204-05.

In short, the detention of aliens at issue here and in other instances is indistinguishable from the incarceration of ordinary criminals. The only difference, of course, is the fact that the aliens in question are *not* serving a criminal sentence and, therefore, have no defined end-point for their imprisonment. And, with regard to excludable aliens, the *Mezei* doctrine arguably sheds them of most protections under the United States Constitution and, through the plenary power doctrine, of meaningful judicial review of their imprisonment.

Such elimination of meaningful human rights protections and judicial review over indefinite and unchallengeable detention – the inevitable product of the *Mezei* regime – virtually guarantees arbitrary and standardless detention of aliens, in violation of international human rights standards. For this reason, the Court should not only affirm the Ninth Circuit's ruling in this case, but also reconsider the validity of *Mezei*'s sanction of indefinite and prolonged incarceration of excludable aliens.

III. Recent Due Process And Equal Protection Jurisprudence Also Mandates A Reconsideration Of *Mezei*

The *Mezei* doctrine also squarely conflicts with modern and well-established principles of constitutional jurisprudence. Indeed, recognizing that the Fifth and Fourteenth Amendments refer to all "persons," and not just "citizens," this Court has traditionally emphasized that aliens – and, in some instances, excludable aliens – must be

afforded due process protection. Indeed, as far back as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court has emphasized that "the Constitution protects all individuals inside the United States, including aliens, from invidious discrimination at state hands." Motomura, 100 YALE L.J. at 565. As stated by the Court, the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality[.]" *Yick Wo*, 118 U.S. at 369.

Thus, in *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court invalidated a statute providing that any Chinese national whom executive officials found to be in the United States illegally "shall be imprisoned at hard labor." *Id.* at 233. Distinguishing the question of whether the government has plenary power to exclude a particular alien, the Court deemed the question of whether it could impose punishment without judicial trial an entirely different matter. As stated by the Court:

> No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.

Id. at 237. In other words, therefore, even an excludable alien has a Fifth, Sixth, and/or Fourteenth Amendment right not to be punished without due process of law. In short, these provisions are "universal in their application," applying to all "persons" in the territorial jurisdiction of the United States. *Id.* at 238 (citing *Yick Wo*, 118 U.S. at 369). And, given that *Wong Wing* applied to an excludable alien, the

principle against arbitrary punishment stands *regardless* of the entry fiction identified and applied in *Mezei*.

More recent authorities describing and further establishing the "punishment doctrine," considered in conjunction with *Wong Wing*'s extension of its protections to excludable aliens, bring into stark relief the Court's need to reconsider the *Mezei* regime. The first of these precedents is *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), in which the Court invalidated a law permitting immigration officials to divest an American of citizenship for leaving the country to avoid the draft. Deeming this sanction punitive, the Court concluded that this punishment could not be imposed "without providing the safeguards which must attend a criminal prosecution." *Id.* at 184. In so doing, the Court identified a multitude of factors for determining whether and when a purportedly civil sanction must be deemed *punitive* and thus, unconstitutional to impose absent the protections of a criminal trial.

More recent decisions – including *United States v. Salerno*, 481 U.S. 739, 747 (1987), *Schall v. Martin*, 467 U.S. 253, 269 (1984), and *Bell v. Wolfish*, 441 U.S. 520, 537-39 (1979) – have focused on the key element of the *Mendoza-Martinez* analysis – *i.e.*, "whether there is a rational alternative purpose for the sanction and whether the sanction is excessive in relation to that alternative purpose." Weisselberg, 143 U. PA. L. REV. at 993. In other words, under the *Mendoza-Martinez* test (as further explained in *Salerno*, *Schall*, and *Bell*), a regulatory sanction – such as the detention at issue here – is constitutional only if it is reasonable and not excessive in relation to the non-punitive purpose for the sanction.

Given that *Wong Wing* established that the punishment doctrine applies equally to excludable aliens, *Mezei* simply cannot be read to permit regulatory detention of such excludable aliens that is "excessive" in relation to its purportedly non-punitive purpose. *Salerno*, 481 U.S. at 747. It goes without saying that indefinite incarceration in a prison, housed together with violent criminals, conceivably

for an alien's entire life, is "excessive" in relation to any regulatory goal – especially one that has no reasonable possibility of being achieved, as is the case where an alien's home country refuses to take him or her back.

This last point is most clearly illustrated by *Jackson v. Indiana*, 406 U.S. 715 (1972), in which the Court ruled that a criminal defendant may not be placed in custody as incompetent to stand trial for more than the reasonable period necessary to determine whether he or she will become competent in the foreseeable future. *Id.* at 738. In short, if the defendant is not likely to become competent in the foreseeable future, the detention has become excessive and unreasonable, and a state must institute commitment proceedings consistent with due process in order for it to continue.

The same principle must apply here, and mandates a reconsideration – or, at least, a recalibration – of the *Mezei* regime. Indeed, in many cases – as in *Barrera*, for instance – excludable aliens have spent over ten years in federal penitentiaries, living among violent criminals, waiting for the INS to be able to deport them. Where it becomes clear that the INS *cannot* deport them, because they are stateless or because their home countries will not take them back, the *Jackson* / *Mendoza-Martinez* punishment doctrine mandates a finding that continued incarceration is unreasonable and excessive, amounting to unconstitutional punishment under *Wong Wing*. Because *Mezei*'s tolerance of indefinite detention – as well as the lower courts' application of *Mezei* to permit its most extreme forms – flatly conflicts with the punishment doctrine, the Court must reconsider *Mezei*'s viability as a constitutional precedent.

Other precedents further call into question the continuing validity of *Mezei*'s withdrawal of constitutional protections from excludable aliens. In other contexts, the Court has emphasized that the Fifth and Fourteenth Amendments apply to all persons, not simply citizens or resident aliens. For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court invalidated a Texas statute that withheld state funds from

local school districts for the education of children not "legally admitted" into the United States and further authorized local school districts to deny enrollment into their public schools to such children. *Id.* at 205. Striking down the statute as violating the Equal Protection Clause, the Court emphasized – as in *Yick Wo* and *Wong Wing* – that the Fourteenth Amendment applies to all *persons*, not merely citizens. *Id.* at 210. Moreover, the Court struck down the statute, despite the fact that the undocumented alien children did not have any "right" to public education – in the same way that, in *Wong Wing*, the Court struck down the statute, despite the fact that the excludable aliens in question had no "right" to be in the country. *Id.* at 221. *See also* Motomura, 100 YALE L.J. at 584 ("*Plyler* recognized a radically broader view of the constitutionally protected community than that implicit in the plenary power doctrine").

In short, *Mezei*, at least as it has been interpreted and applied by the lower courts in such cases as *Barrera* and *Gisbert* (and by the Fifth Circuit in *Zadvydas*), does not take into account these additional precedents or the evolution of the *Wong Wing* punishment doctrine. As such, the case must be viewed as a McCarthy Era relic involving national security issues, demanding reconsideration and rejection in favor of modern principles of constitutional jurisprudence.

CONCLUSION

The decision of the Court of Appeals should be affirmed. In addition, however, the Court should revisit its *Mezei* ruling in light of fundamental precepts of international law barring arbitrary detention, as well as the evolution of constitutional jurisprudence concerning punishment and regulatory sanctions.

Respectfully submitted.

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In The

Supreme Court of the United States

JANET RENO, et al.,

Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN ASSOCIATION OF JEWS FROM THE FORMER USSR, CAMBODIAN ASSOCIATION OF AMERICA, CAMBODIAN ASSOCIATION OF GREATER PHILADELPHIA, CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, CUBAN AMERICAN ALLIANCE EDUCATION FUND, CUBAN CHRISTIAN DEMOCRATIC HUMAN RIGHTS COMMISSION, HMONG NATIONAL ORGANIZATION, HUMAN RIGHTS IN CUBA, IMMIGRATION TASK FORCE OF MINNESOTA, INTERNATIONAL REFUGEE CENTER OF OREGON, LATIN AMERICAN COMMISSION FOR THE RIGHTS AND FREEDOMS OF THE WORKERS AND PEOPLES, MIDWEST IMMIGRANT & HUMAN RIGHTS CENTER, MOTHERS FOR FREEDOM, MOUNT CARMEL CAMBODIAN CENTER, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, SOLIDARITY OF CUBAN WORKERS, SOUTHEAST ASIAN ACTION COALITION, AND UNITED CAMBODIAN COMMUNITY AS *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*[1]

Amici are community groups whose members are disproportionately affected by the indefinite detention policies of the Immigration and Naturalization Service ("INS"). Our members are the spouses, siblings, parents, children, friends, and neighbors of long-time United States residents who have been detained indefinitely by the INS. We are United States residents and legal permanent residents who share a common sense of hopelessness and frustration caused by the plight of our family and community members in indefinite detention. Like Kim Ho Ma, who was admitted to this country as a refugee at the age of seven, many of our family members have been placed in indefinite detention despite the fact that they have resided legally in this country for much of their lives. Many have spouses, children, parents, and siblings who are United States citizens or permanent residents. Most have deep, long-standing ties to the communities in which they live and in which they grew up. We submit this brief to the Court to demonstrate that people who have resided in the United States legally for years are entitled to due process protections and cannot be treated as if they arrived at the border yesterday.

The **American Association of Jews from the Former USSR** is a grassroots mutual assistance and refugee advocacy organization which unites and represents the interests of Russian-speaking Jewish refugees and legal

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[1] This brief was authored in whole by *amici curiae*. No person or entity, other than *amici curiae*, their members, or their counsel, contributed to the costs of preparation and submission of this brief.

immigrants from the former Soviet Union. Jewish refugees from the former Soviet Union are adversely affected by many aspects of the 1996 immigration laws.

The **Cambodian Association of America** is the oldest Cambodian non-profit organization in the United States and serves the Cambodian community by providing linguistically and culturally appropriate social services that assist Cambodian people in their adaptation to the social, cultural and economic environment of the United States.

The **Cambodian Association of Greater Philadelphia** is a non-profit agency that seeks to improve the quality of life for Cambodian-Americans by providing services, advocating, and empowering Cambodian-Americans within Greater Philadelphia to obtain equal access to social and economic development, quality health care and education. We do so through social, educational and cultural programs, many of which are targeted at Cambodian youth.

Citizens and Immigrants for Equal Justice (CIEJ) is a national coalition of about 700 families in twenty-nine states whose integrity has been or is directly threatened by the 1996 immigration laws. Our members are United States citizens and lawful permanent residents: the family members of lawful permanent residents who face deportation and detention. Painfully, inhumane detention policies have separated many of these loved ones from us indefinitely. On behalf of our loved ones, we have attempted to express our concerns to the INS, worked to spread our message through community groups, and advocated humane statutory change in Congress.

The **Cuban American Alliance Education Fund, Inc.** (CAAEF) is a national nonprofit coalition of Cuban American organizations that works for family reunification and educates the public at large on issues related to hardships caused by current U.S.-Cuba relations. CAAEF is a vehicle for the development of mutually beneficial engagements which promote understanding and human compassion.

The **Cuban Christian Democrat Human Rights Commission, Human Rights in Cuba, The Solidarity of Cuban Workers**, and the **Latin American Commission for the Rights and Freedoms of the Workers and Peoples**, are all non-profit human rights organizations which individually and jointly advocate both nationally and internationally on behalf of Cuban and other refugees and immigrants who are being detained by the INS. We have worked with and on behalf of detainees and their families to request changes to U.S. immigration policies that result in the prolonged, indefinite detention of immigrants.

The **Hmong National Organization** (HNO) is a non-profit organization which seeks to improve the education, growth and development of the Hmong community by providing after school academic programming that emphasizes preservation of the Hmong language and culture while simultaneously providing academic assistance to Hmong youth. HNO also provides many services to the Hmong community, including transportation, interpretation, health education, and citizen instruction.

The **Immigration Task Force of Minnesota** is a coalition of more than seventy religious, social service and community groups working with and for immigrants and refugees to increase awareness of the immigrant experience and the contributions made by immigrants to this country, as well as the effects of policy changes on immigrants and refugees, and to advocate for just, fair, and equitable policies. Minnesota immigrant and refugee communities, especially political refugees from Somalia, Cambodia, and Cuba, are disproportionately affected by indefinite detention.

The **International Refugee Center of Oregon** was established twenty-four years ago to help refugees coming to Portland from all over the world and in particular to help them find their first job in the United States. Our mission is to promote self-sufficiency among refugees and to help refugees preserve their culture.

The **Midwest Immigrant & Human Rights Center** (MIHRC) is a not-for-profit legal services program providing legal assistance and counseling to low-income immigrants regardless of their legal status. MIHRC is a program of the Heartland Alliance for Human Needs & Human Rights, which has provided legal service to and advocacy on behalf of Chicago area residents since 1888. For over 100 years, the Heartland Alliance has met the needs of Chicago's immigrants and refugees through a broad range of social, educational, legal, health, housing and employment programs.

Mothers For Freedom is a group of Cuban-American women whose family members are in INS detention. In 1998 and 1999, our members went on hunger strikes for

more than 40 days at the entrance of the INS Krome Detention Center in Miami to call attention to the plight of our family members and the inadequacy of INS review procedures.

The **Mount Carmel Cambodian Center** serves the Cambodian community in Southern California and nationally through community development programs such as literacy, citizenship, and census awareness projects, long-term student mentoring, and the Cambodian Community Employment Project. Many of the Cambodian immigrants whom our center assists are the family members of indefinite detainees.

The **National Asian Pacific American Legal Consortium** (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian-American Legal Defense and Education Fund, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in legal and public policy advocacy as well as community education on discrimination issues. The Consortium has been engaged in national efforts to reverse the most harmful provisions of the 1996 immigration laws. The question presented by this case is of great interest to NAPALC as it implicates due process protections for Asian Pacific Americans in this country.

The **Southeast Asian Action Coalition** is a grassroots community group of Hmong, Lao, Vietnamese, and Cambodians in Minnesota that seeks to develop and empower

culturally appropriate community leadership to collectively engage in making policy decisions affecting the Southeast Asian community.

United Cambodian Community, founded in 1978, represents about 50,000 Cambodian refugees in Long Beach, California. Our programs aim to help these refugees to adjust themselves smoothly into the American mainstream, and include the Cambodian Community Employment Project, Youth Scope Program, After School Tutoring Program, Cambodian Classical Arts Preservation, and Mental Health Program.

BACKGROUND

Under the INS's interpretation of Section 241(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(6) (2000), even a long-time legal resident can be subjected to prolonged, and possibly lifelong, detention simply because the United States – through no fault of the individual's – is unable to obtain travel documents to effect removal. *See Pet. Brief* at 14-18. Those affected by this policy include individuals from countries without diplomatic ties with the United States, those from countries that do not have repatriation agreements, those who are stateless due to changing or restrictive citizenship laws, and those from countries without functioning governments. Also affected are those granted relief under the Convention Against Torture, who cannot be legally

removed to their country of origin.[2] Indefinite detention has torn apart many families that have spent years building new lives in this country.

I. Communities affected by indefinite detention

To describe our family members in indefinite detention as "removable aliens" obscures the fact that they came to this country legally – many as refugees who had little choice but to flee their homelands. The communities hardest hit by indefinite detention are those comprised of refugees from Laos, Cambodia, Vietnam, and Cuba. Many served the United States during the Vietnam War, or had parents who served the United States. And still others, the children of unknown American soldiers, came to America seeking refuge in the country of their fathers.

Since 1975, the United States has provided refugee resettlement to nearly one million Vietnamese, Laotians, and Cambodians who initially fled to neighboring countries. In addition, the United States has provided resettlement to another 500,000 Vietnamese who were processed in Vietnam through the Orderly Departure Program in a combination of refugee and immigration programs.[3]

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[2] *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Foreign Affairs Reform and Restructuring Act of 1998 § 2242, Pub. L. No. 105-277, 112 Stat. 2681, 2681-821, codified in 8 C.F.R. § 208.16-18 (2000).

[3] *See* Dep't of State, Dep't of Justice, and Dep't of Health and Human Services, Proposed Refugee Admissions for Fiscal Year 2001: Report to Congress (2000) at 7 (visited Dec. 7, 2000) <http://www.state.gov/www/global/prm/admissions___resettle.html>.

Among these refugees were many Vietnamese who worked for the American government during the long U.S. involvement in Vietnam;[4] members of the Hmong tribal group from Laos who fought alongside, and rescued, American soldiers during the war;[5] and survivors of the Cambodian "killing fields" in which an estimated one to three million people were killed out of a population estimated at 7.3 million.[6]

Refugees from Cuba are also subject to indefinite detention. In the years following the 1959 revolution in Cuba, several hundred thousand Cubans fled the island, including the approximately 260,000 refugees who were officially airlifted from Cuba during the United States-Cuban Freedom Flights program of 1965-1971.[7] In mid-1980, the massive exodus known as the Mariel Boatlift brought a new wave of over 120,000 Cuban refugees to our shores. *See* MARK S. HAMM, THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE 50 (1995). Although the popular press portrayed many of these so-called "Mariel Cubans" as criminals, in fact only

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[4] *See* PAUL J. STRAND AND WOODROW JONES, INDOCHINESE REFUGEES IN AMERICA 32-33 (1985). *See also* U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, PUB. NO. 8955, BACKGROUND NOTES: VIETNAM (1995).

[5] *See* Jim Sheeler, *Ceremony to Honor 'Secret War' Hmong Helped U.S. Battle N. Vietnamese*, DENVER POST, Jul. 21, 2000, at A1.

[6] U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, PUB. NO. 7747, BACKGROUND NOTES: CAMBODIA (1990).

[7] *See* U.S. Dep't of State, Background information on migration from Cuba (visited 12/7/00) <http://www.state.gov/www/regions/wha/cuba/migration.html>.

350 were found to have serious criminal records, a proportion of criminality considerably lower than that found in the general U.S. population at the time. *See id.* at 59. The vast majority of the Mariel Cubans were paroled into the United States as refugees and many later became permanent residents. *See id.* at 58.

Also affected by indefinite detention are individuals whose citizenship is not recognized by any country. For example, the Romani, commonly referred to as gypsies, are considered to be stateless by many countries. *See, e.g., Moro v. INS*, 58 F. Supp. 2d 854, 855 (E.D. Ill. 1999) (refusal of Yugoslavia to recognize citizenship of Romani). Those born in refugee camps are often considered stateless as well. *See, e.g., Zadvydas v. Underdown*, 185 F.3d 279, 283-4 (5th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (individual born in refugee camp in Germany not recognized as citizen by either Germany or Lithuania). Another form of statelessness arises from shifts in national boundaries or rule. The breakup of the former Soviet Union, for example, led to the formation of a number of independent states; these new nations have in many instances refused to recognize as citizens those who were not physically present at the time independence was declared. *See, e.g., Batyuchenko v. Reno*, 56 F. Supp. 2d 1163, 1163 (W.D. Wash. 1999) (refusal of Belarus to recognize citizenship of refugee from former Soviet Union). Soviet Jews, who experienced persecution throughout the Soviet republics and continue to flee from those areas to this day, comprised one of the two most numerous groups of refugees to

come to the United States from the 1970s through 1990.[8] Many of these refugees came from areas such as Ukraine that are now independent states.[9] As recent events in the Balkans and elsewhere make clear, statelessness threatens to be an enduring issue in this era of shifting borders.

II. Illustrative cases of families that have been affected by indefinite detention

As refugees and immigrants, we have built new lives in this country. We work for or run local businesses. Our children attend local schools and play on local athletic teams; they grow up and get married here, and begin families of their own.[10]

As we have learned, however, our communities are not immune from the problems that affect all American communities. Some of us, particularly our young people,

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[8] STEVEN J. GOLD, REFUGEE COMMUNITIES: A COMPARATIVE FIELD STUDY 3 (1992) (identifying Soviet Jews and Vietnamese as the most numerous refugee groups during this period).

[9] *See, e.g.*, Gary Rotstein, *From Russia with Hope: Kiev Family Flees Anti-Semitism to Grapple with a New Language and a New Land*, PITTSBURGH POST-GAZETTE, February 21, 1995, at C1; Nicole Carroll, *Living in the U.S.A.: Soviet Jews Find New Home, Study Twang on Texas Border*, HOUSTON CHRONICLE, December 8, 1991, at 12.

[10] For discussions of some of the refugees referred to in this brief, *see, e.g.*, John K. Whitmore et al., *The Socio-Cultural Basis for the Economic and Educational Success of Southeast Asian Refugees (1978-1982 Arrivals), in* REFUGEES AS IMMIGRANTS 121 (David W. Hines ed. 1989); NATHAN CAPLAN ET AL., CHILDREN OF THE BOAT PEOPLE: A STUDY OF EDUCATIONAL SUCCESS (1994); JAMES S. OLSON AND JUDITH E. OLSON, CUBAN AMERICANS: FROM TRAUMA TO TRIUMPH 94 (1995); GOLD, *supra* note 8.

go astray at some point in our lives. In addition to the issues that face all communities, ours face the added factor that many of us endured trauma and violence in fleeing our homelands, as well as the stresses of social dislocation and generational conflict that have arisen during our integration into American society. *See, e.g.*, LILIAN FADERMAN WITH GHIA XIONG, I BEGIN MY LIFE ALL OVER AGAIN: THE HMONG AND THE AMERICAN IMMIGRANT EXPERIENCE (1998). For example, many Cambodian refugees saw members of their families tortured, mutilated or killed. *See* JAMES A. TOLLEFSON, ALIEN WINDS, THE REEDUCATION OF AMERICA'S INDOCHINESE REFUGEES 29 (1986). They arrived at refugee camps on the brink of starvation. *See id.* at 4. Refugees who survived these horrifying conditions have post-traumatic stress symptoms that have been compared to those experienced by Holocaust survivors.[11]

For our young people, relatively minor brushes with the law can have lifelong consequences. Under the broad sweep of the Antiterrorism and Effective Death Penalty Act[12] and the Illegal Immigration Reform and Immigrant Responsibility Act[13] passed in 1996, even a conviction for petit larceny can result in mandatory removal regardless

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[11] *See* Cambodian Health Network, The Roots of the Cambodian Health Crisis (Working Paper) at 1 (viewed 12/12/00) <http://www.cambodianhealth.org>.

[12] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[13] Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

of the equities of the individual case.[14] Under the INS's current policy of indefinite detention, those orders of removal can mean incarceration for years on end, far from family and loved ones. Even individuals who served no time in jail can be subjected to indefinite detention. *See Vo v. Greene*, 63 F. Supp. 2d 1278, 1279 (D. Colo. 1999); Bruce Finley, *Trapped Between Two Countries: Laotian Among Immigrant Criminals in Limbo*, DENVER POST, Feb. 29, 2000 at A1.

When someone is placed in indefinite detention, it affects not just the individual but the entire family. The following are just a few examples of the ways in which families that have rebuilt their lives in the United States have been torn apart by indefinite detention.

A. The Kay Family

After losing her husband and her daughter to the conflict in Cambodia, Chorn Porn fled the Cambodian

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[14] Under the current Immigration and Nationality Act, individuals convicted of crimes that are labeled as "aggravated felonies" are barred from relief from removal. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2000). Courts of Appeals have held that misdemeanor convictions can meet the definition of "aggravated felony." *See United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000) (holding that misdemeanor conviction for shoplifting for which a suspended sentence of one year was given constitutes "aggravated felony" within the meaning of the INA); *United States v. Graham*, 169 F. 3d 787, 791-92 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999) (holding that a conviction for petit larceny that carries a maximum sentence of one year constitutes an "aggravated felony" within the meaning of the INA).

killing fields on foot with her three surviving children, Sombat Map Kay, Mouv Kay, and Nochanntha Kay. They arrived at the Koie Dang border refugee camp in Thailand and spent several years in refugee camps. In 1985, a few days after Sombat's eleventh birthday, they were admitted to the United States. The family was resettled in Manchester, New Hampshire, where they were sponsored by the International Institute of New Hampshire. Saroeun Khan, an uncle, also resettled in Manchester, and took on a father-figure role with the children.

Sombat attended elementary and high school in Manchester, where he was known as a reliable friend and a good basketball player. He became involved with a bad crowd, however, and in 1992, at the age of seventeen, he was convicted of armed assault and sentenced to ten years with the possibility of parole in three. During his incarceration, Sombat completed an intensive, six-month Anger Management and Behavioral Modification program as well as a GED course. He also received employment training and held a position as a grounds keeper on the janitorial staff. He was active in group programs such as basketball, football, and baseball.

In 1996, while still in prison, Sombat was ordered removed to Cambodia. Upon his release from prison in December, 1997, he was taken into INS custody. Cambodia does not have a repatriation agreement with the United States and thus would not issue Sombat the necessary travel documents. In spite of Sombat's strong family ties in Manchester and his proven record of rehabilitation, he was kept in detention. He was released only after a federal court granted his petition for a writ of habeas

corpus in April, 2000, after he had spent nearly two-and-a-half years in detention.[15]

B. The Yngelmo Family

Maria and Pedro Yngelmo fled Cuba in 1981, bringing with them their four-year-old son, Pedro Jr., and his younger sister, Ana. They settled in Elizabeth, New Jersey. Maria has been employed as an accounting clerk at the Elizabethtown Water Company for the past thirteen years. Pedro Sr. is a hi-low driver at a Pathmark warehouse in Elizabeth. The Yngelmos have lived in the same apartment in Elizabeth for over a decade. Ana recently graduated from the Wharton School of Business at the University of Pennsylvania and is an economic consultant with Deloitte and Touche in New York City. Maria, Pedro Sr., and Ana are all naturalized U.S. citizens.

Pedro Jr. was an honors student in the Gifted and Talented Program of the City of Elizabeth Public Schools and a star Little League baseball player. He became involved with drugs, however, and in 1995, at the age of 19, he was convicted on drug and handgun possession charges and sentenced to four years in prison. While in prison he was ordered removed, and upon completion of his sentence he was released into INS custody and placed in detention. Cuba does not have diplomatic ties with the United States and thus does not issue travel documents to those whom the United States wishes to remove. Pedro

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[15] *See Kay v. Reno*, 94 F. Supp. 2d 546, 547-48 (M.D. Pa. 2000); Pet. for Writ of Habeas Corpus, *Kay v. Reno*, 1:CV 99-251 (M.D. Pa. 1999), Exh. B (Petitioner's Request for Order of Supervision and Supporting Documentation, dated July 13, 1999) at 1-7.

remained in detention for nearly eighteen months. He was not released from detention until November, 2000, following his filing of a habeas corpus petition in district court.[16]

C. The Batyuchenko Family

Dennis Batyuchenko and his parents immigrated to the United States as religious refugees from the Soviet Union in 1991 and settled in Bellevue, Washington, a suburb of Seattle. Like other Soviet refugees, they were forced to renounce all rights to Soviet citizenship in order to leave. At the time that the family came to America, Dennis was sixteen years old.

From May, 1993 until September, 1995, Dennis worked as a volunteer weightlifting instructor at the Crossroads Community Center in Bellevue. In recognition of his significant contribution to the Community Center, he was selected as the City of Bellevue's "Volunteer of the Quarter." In 1995, however, Dennis was convicted of theft and sentenced to five days in jail (with three days suspended) and twelve months probation. In 1996, he was convicted of receiving stolen property; he received a sentence of one year in jail and was released after serving

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[16] *See* Pet. for Writ of Habeas Corpus, *Yngelmo v. Reno*, 00-1035 (D. N.J. 2000) at ¶¶ 12-34 & Exh. A (Petitioner's request for Order of Supervision and Supporting Documentation dated Nov. 19, 1999) at 1-5; Petitioner's Memorandum of Law in Support of Petition for Writ of Habeas Corpus and Order to Show Cause at 1-6; Steve Chambers, *Cuban Man Escapes Legal Limbo – Family Efforts Help Win Release for INS Detainee*, STAR-LEDGER (Newark), Nov. 27, 2000; Steve Chambers, *Inmates Languish in Legal Limbo – Cuban Now A "Lifer" Under INS Authority*, STAR-LEDGER (Newark), Jun. 18, 2000.

123 days. On the basis of the 1995 and 1996 convictions, Dennis was taken into INS custody in December, 1996 and ordered deported to Belarus (which had become an independent nation in the time since Dennis's family emigrated) in January, 1997. Both Belarus and Russia refused to recognize Dennis as a citizen, and he was held in indefinite detention by the INS. Dennis was not released from INS custody until his petition for habeas corpus was granted in September, 1999, two-and-a-half years after he entered INS custody.[17]

D. The Fernandes Family

In 1971, at the age of ten, Jose Fernandes came to the United States from Angola with his family. The Fernandes family settled in Rhode Island as legal immigrants. Jose grew up in Rhode Island and attended local schools. Besides his immediate family, Jose also has aunts, uncles and cousins living nearby. In the early 1990s, he regularly attended weekly Bible Study sessions at the Fourth Baptist Church in Providence. He became addicted to drugs, however, and in 1995 he was convicted on charges of

[17] *See Batyuchenko v. Reno*, 56 F. Supp. 2d 1163, 1163 (W.D. Wash. 1999); Pet. for Writ of Habeas Corpus, *Batyuchenko v. Reno*, C 99-185 R (W.D. Wash. 1999) Exh. A (Aff. of Jay W. Stansell, Esq., dated Aug. 27, 1999) at ¶¶ 5-20 & Exh. G at 1-3 (Letter of James McClain, Recreation Coordinator, Crossroads Community Center; letter to Mr. Batyuchenko from James McClain dated Aug. 27, 1994); Order Granting Writ of Habeas Corpus, Sept. 10, 1999; *Varied Route Led Immigrants to INS Custody*, Seattle Post-Intelligencer, June 17, 1999, at B1; Lise Olsen, *Case Tests the Rights of Immigrants Held in US Jails*, Christian Science Monitor, May 25, 1999, at 2.

drug sale and possession and sentenced to ten years, of which all but two years were suspended.

While in prison, Jose completed numerous training programs, including Infectious Disease Peer Education, HIV-STD Prevention, Law Library Research, High School Equivalency, Computer Literacy, and a workshop on Alternatives to Violence. He was an active participant in the Relapse Prevention/Drug Education Group and the Cognitive Restructuring/Trigger Identification Group. In August, 1996, while still in prison, Jose was ordered removed to Angola or, in the alternative, to Portugal.

Jose was released from prison in September, 1996, taken into INS custody, and placed in detention. Angola, which had been a Portuguese colony at the time of the Fernandes family's departure and had subsequently gained independence, refused to issue him travel documents. So did Portugal and Cape Verde. As he stated in his *pro se* petition for habeas corpus, "Myself, being raised in America, it would be devastating for me to be deported back to Angola. 99% of my family is here in America." Nevertheless, faced with the prospect of a life sentence in INS detention, Jose wrote repeatedly to Angola pleading with the government to issue him the necessary documents, to no avail. He was not released from detention until his petition for habeas corpus was granted in May, 1999, nearly three years after he had been taken into INS custody.[18]

[18] *See Fernandes v. INS*, 79 F. Supp. 2d 44 (D. R.I. 1999); Pet. for Writ of Habeas Corpus, *Fernandes v. INS*, 97-CV-630 (D. R.I. 1997), at ¶¶ 11-12 & Exhibits; Karen Lee Ziner, *Immigration Officials Ordered to Release Legal Alien From Prison*, Providence Journal, May 1, 2000, at A4.

These examples go on and on. Thousands of American families have lost children, parents, siblings, and other loved ones to the INS's indefinite detention policies.

ARGUMENT

DUE PROCESS APPLIES TO OUR FAMILY MEMBERS DUE TO THEIR LONG-STANDING TIES TO THE UNITED STATES

As longtime legal residents of the United States, our family members are entitled to due process protection. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments. . . . "). The Due Process Clause of the Fifth Amendment protects us in its simple guarantee that "no person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Our family members, who have been present in the United States for years, should not be treated as if they had never entered the United States at all.

The Court has made a clear differentiation between the government's plenary power over the "right of the alien to land," *Yatamaya v. Fisher*, 189 U.S. 86, 98 (1903), and the government's lesser powers with respect to resident aliens. *See Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within

the United States after an entry, irrespective of its legality."). In *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), the Court held that "[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."

Refugees by definition have forsaken their ties to the countries they fled. Describing Southeast Asian refugees, sociologist Steven J. Gold explains, "[Most] boat people realized the futility of retaining attachments to a way of life they knew no longer existed. Further, because their experience of migration was so painful, many wished to distance themselves from past." *See* STEVEN J. GOLD, REFUGEE COMMUNITIES: A COMPARATIVE FIELD STUDY 117 (1992). Many members of our communities did lose everything, and did rebuild their lives in the United States. The ties cited by the Court in *Plasencia* are thus particularly meaningful to our communities, which lost so much and have worked so hard to build anew.

Although our family and community members have final orders of removal, this does not change the fact that, like the petitioner in *Plasencia*, they gained admission to this country – in some cases, decades ago – and developed the family and community ties that go with permanent residence. Pedro Yngelmo has lived in New Jersey since the age of four. His entire education has been in New Jersey public schools. Everyone else in his immediate family is a naturalized U.S. citizen. Sombat Map Kay has lived in New Hampshire since he was eleven years old. With the exception of one elderly aunt whose whereabouts are unknown, every surviving member of his

entire extended family is in New Hampshire. Jose Fernandes has lived in Rhode Island for twenty-nine of his thirty-nine years. Virtually all of his family resides in the United States. With the issuance of a final order of removal, our family members' technical immigration status has changed, but the circumstances of their lives have not. They are still individuals who have lived in the United States for years, and many have spent the better part of their lives here.

The weight accorded to family ties in *Plasencia*, 459 U.S. at 34, is part of a broader constitutional framework recognizing family unity as a significant private interest worthy of constitutional protection. *See Moore v. East Cleveland*, 431 U.S. 494, 503-4 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). Those in indefinite detention are there because the government has failed to locate a country to which they can be removed. For these individuals, therefore, the United States is not only *a* locus of family ties, it is in fact the *only* locus of such ties. Even if the families of detainees were willing and able to make the extreme sacrifice of giving up all they have built in the United States (either as immigrants or as native born United States citizens) and relocating to another country to be with their loved one, no such option exists.

The separation wrought by indefinite detention places a great strain not only on detainees but on their families, who are deprived of the emotional and, often,

financial support of a parent, child or spouse. For refugees in particular, many of whom have already lost family members to the violence and persecution from which they fled, losing a family member to indefinite detention is an extreme hardship. Chorn Porn, for example, endured the loss of her husband and daughter, and much of her extended family, in the killing fields of Cambodia; she then had to endure the loss of her son Sombat to indefinite detention. Assuring the application of constitutional scrutiny based on the reality of family and other ties protects these U.S. citizen and permanent resident family members of those the INS is detaining indefinitely.

CONCLUSION

In the words of indefinite detainee Arounkon "Tay" Saynarouth, a 24-year-old refugee from Laos who has resided legally in the United States since the age of six, "Everything we learned was from American society. But the INS considers us the problem of America. We're not perfect. But the INS can't keep us [in detention] forever because of that." *See* Tony Perez-Guise, *Waiting to Exile*, WESTWORD, Jan. 21, 1999, at 14. Like Mr. Saynarouth, many of our family and community members in detention have also lived here since they were small children. All of the people and places to which they are tied are here in the United States. To treat them as individuals newly arrived at the border is to turn a blind eye to the most basic circumstances of their lives.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: December 22, 2000
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In the

Supreme Court of the United States

JANET RENO, Attorney General of the United States, *et al.*,

Petitioner,

--v.--

KIM HO MA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., FLORIDA IMMIGRANT ADVOCACY CENTER, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE ASIAN LAW CAUCUS IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF THE AMICI CURIAE[1]

The Catholic Legal Immigration Network, Inc. (CLINIC), a subsidiary of the U.S. Catholic Conference, is a nonprofit agency that provides support to approximately 130 Catholic charitable immigration programs nationwide. It directly represents immigrants in Immigration and Naturalization Service (INS) detention in seven sites and, since 1998, has administered a national program to support and represent immigrants held indefinitely in INS detention. CLINIC submits this amicus brief to illustrate the experiences of its attorneys with INS's custody review process and the failure of the procedures to provide minimal fairness and genuine consideration in custody decision-making.

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit organization whose mission is to promote the human rights of immigrants through legal services. FIAC's attorneys have represented many indefinitely detained immigrants in their pursuit of release from INS detention. FIAC has continuously documented and reported on treatment of INS detainees and conditions of detention at Krome Service Processing Center in Miami and in Florida's county jails. In FIAC's experience, the INS's custody review procedures routinely fail to ensure that indefinite

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[1] This brief *amici curiae* is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. *See* Supreme Court Rule 37.

detainees receive fair and full reviews of their cases.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 10,000 attorneys. NACDL is affiliated with the state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and, as such, it speaks for more than 28,000 criminal defense lawyers nationwide. NACDL lawyers have represented hundreds of indefinite detainees in the INS custody review process and succeeded in winning federal habeas relief for many of them.

The Asian Law Caucus (ALC) is the nation's oldest legal and civil rights organization serving the low-income Asian Pacific American communities. The Southeast Asian Immigrants' Rights Project at ALC has represented dozens of indefinite detainees at custody reviews and performed legislative advocacy on a national basis regarding the unfairness of indefinite detention.

INTRODUCTION

On any given day, the INS detains approximately 5,000 persons who cannot be deported because their countries will not accept them.[2] This

[2] Catholic Legal Immigration Network, Inc., *The Needless Detention of Immigrants in the United States*, Report 4, Aug. 2000, at 45 (visited Dec. 19, 2000) < http://www.cliniclegal.org/atriskrprt.htm> (hereafter, "*Needless Detention*") (username: clinicsf, password: 94104). These individuals include: 1) detainees from countries that do not have diplomatic ties with the United States (e.g., Cuba); 2) detainees from countries that do not have repatriation agreements with the United States and that will not accept them because of their criminal convictions (e.g., Vietnam, Laos and Cambodia); 3) detainees who are stateless (e.g., Palestinians) or from countries without a functioning government; 4) detainees granted relief under the Convention Against Torture but not released from detention; and 5) detainees whose countries refuse to issue travel documents although there is no legal barrier to doing so.

"lifer" population ballooned after the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996[3] ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[4] ("IIRIRA"), which greatly broadened the crimes for which non-citizens may be deported, made the new grounds of deportability retroactive, and eliminated previously available discretionary relief from deportation. Under current practice, these indefinite detainees are released only if the INS determines them to be not a danger to the community or a flight risk.

This brief *amici curiae* summarizes the reality of the INS's custody review procedures for INS detainees with final removal orders. The government relies heavily on the existence of these administrative custody reviews to argue that Mr. Kim Ho Ma's detention is not excessive. Aside from the fact that no amount of process can cure a substantive due process violation, the amici demonstrate below how, in practice, the process does not protect our clients from erroneous, arbitrary and unnecessary deprivations of liberty.

The amici illustrate, through the case examples

[3] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

of the people whom we have represented, how the custody review procedures, along with the harsh conditions of INS detention facilities, combine to deprive persons of liberty for years on end. Despite the government's stated release procedures, detainees continue to be detained in violation of their due process rights.

EXPERIENCE OF THE AMICI CURIAE WITH THE INS CUSTODY REVIEW PROCESS

The following cases are representative of the serious shortcomings in the custody review process experienced by the many clients of the amici.

Case #1: Thanh Cao Nguyen, a Vietnamese citizen and former lawful permanent resident, was held in INS detention for three and a half years before the INS performed a review of his custody status.[5] Over the course of his detention, INS transferred him five times to five different facilities in southern California, northern California, Minnesota, and, ultimately, Florida -- far from his only family members in California.[6] Because the INS failed to forward Mr. Nguyen's mail, he missed an appeal deadline in a pro se federal case he brought to challenge his indefinite

[5] Documents regarding detention conditions and the INS custody review process are lodged with the Clerk of this Court. They will be referred to in this brief as "L"- followed by the lodging page number. L-144 (petition for writ of habeas corpus).

[6] L-147-149 (petition for writ of habeas corpus).

detention.[7]

While in Florida, Mr. Nguyen was one of the few INS administrative detainees held in the Coleman state prison. He spent one year confined to a small cell in administrative isolation under 23-hour lockdown even though there was no disciplinary reason. Mr. Nguyen was given very limited access to a telephone, legal materials, and recreational facilities.[8] After his attorney pre-arranged a visit through prison officials and traveled over four hours to interview Mr. Nguyen, she was unjustifiably denied access and forced to return the next day.[9] Due to long lines and limited visiting hours, the attorney was only able to meet with Mr. Nguyen for twenty minutes to help him prepare a request for release.[10] Mr. Nguyen's case illustrates how frequent transfers, the harsh conditions of detention, limited access to counsel, and the lack of timely custody reviews cause persons to be detained unfairly for years with little hope of release.

Case #2: Julio Martull-Garcia, a Cuban citizen and former lawful permanent resident, was detained by the INS in 1995 in the Victoria County jail in Texas after having been ordered removed in 1991 for alien smuggling.[11] In June 1999, the INS denied Mr. Martull's release request in a letter that stated simply

[7] L-148 (petition for writ of habeas corpus).

[8] L-149 (petition for writ of habeas corpus).

[9] L-149.

[10] L-149.

[11] L-142 (counsel's letter to INS).

that his release was not "warranted at this time."[12] In May 2000, Mr. Martull submitted a letter to the INS requesting a custody review interview.[13] In support of his request for release from custody, Mr. Martull submitted to the INS letters of recommendation from various jail personnel stating that he "displayed excellent behavior," had no disciplinary infractions, volunteered to help tutor ESL students, and completed an Alcohol Treatment program.[14] Mr. Martull has four young U.S. citizen children in need of his support.[15] The INS has failed to respond to Mr. Martull's request for release . He has now been detained for over five years. Mr. Martull's case demonstrates how the INS ignores strong equities in support of release.

Case #3: Kiet Van Le Nguyen, a native of Vietnam and former lawful permanent resident, was held at the INS Detention Facility in El Centro, California, after receiving a final order of removal.[16] In February 2000, a single INS deportation officer conducted a custody review interview of Mr. Nguyen. The purpose of the interview was to determine whether Mr. Nguyen had demonstrated that he was not a danger to the community or a flight risk and, therefore, could be released.

The interview consisted of the deportation officer asking Mr. Nguyen to confirm the contents of

[12] L-63 (INS decision).
[13] L-133 (counsel's letter to INS).
[14] L-142 (counsel's letter to INS).
[15] L-133 (counsel's letter to INS).
[16] L-157 (habeas petition declaration).

the officer's memorandum from a prior custody review summarizing Mr. Nguyen's criminal convictions.[17] The officer's notes during the interview consisted of a single sentence. Counsel for Mr. Nguyen objected to the summary nature of the interview and requested that the deportation officer allow Mr. Nguyen to explain the underlying facts and mitigating circumstances of his criminal history to demonstrate his non-violent character.

The deportation officer responded that he would not consider such information and that Mr. Nguyen would not be released due to his criminal convictions. The officer further stated that "zero" had changed regarding Mr. Nguyen's dangerousness and risk of flight and, therefore, he did not need to change or re-write his memorandum from the prior custody review.[18] Mr. Nguyen's case illustrates the unfairness of the INS custody reviews.

ARGUMENT

I. THE INS CUSTODY REVIEW PROCESS DOES NOT PROTECT PERSONS FROM EXCESSIVE DETENTION.

A. INS Fails to Conduct Timely Custody Reviews and Provide Proper Notice.

The government's position that its custody review procedures for indefinite detainees cure any

[17] L-157 (habeas petition declaration).
[18] L-158 (habeas petition declaration).

substantive due process concerns is not supported by the experience of the amici curiae counsel who represent persons in INS detention. Despite INS regulations, policy memoranda, and proposed regulations, the INS has consistently failed to provide fair and timely custody reviews for detainees with final orders of removal. The result has been that detainees languish indefinitely for years in INS detention.[19]

After the mandatory detention provision went into effect in 1997, detainees who had final removal orders, but who had not been deported after 90 days, requested custody reviews from the INS. The detainees sought the opportunity to demonstrate that they did not pose a risk to the community or a flight risk, and that the new law, therefore, mandated their release.

Initially, many INS officers refused to consider release of indefinite detainees and instead informed them incorrectly that they were "ineligible for any type of release"[20] and would be detained until they could be returned to their native countries.[21] The INS simply ignored other requests for custody reviews.[22] In some cases, the INS refused to consider release due to the detainee's criminal history, a rationale that prompted one INS officer to note in his custody review that INS

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[19] L-142 (counsel's letter to INS); L-144 (petition for writ of habeas corpus).

[20] L-65 (INS letter).

[21] L-66 (INS letter).

[22] In one case, the INS failed to respond to eight requests for a custody review submitted over the course of 19 months. L-160-161 (habeas petition declaration).

would be "keeping them in custody forever."[23]

INS Headquarters issued directives in the February 3, 1999 Pearson Memorandum,[24] the April 30, 1999 Meissner Statement,[25] and the August 6, 1999 Pearson Memorandum,[26] which required custody review decisions within 90 days of a final order of removal with subsequent custody reviews every six months. However, INS district offices largely continue to ignore these directives.[27] Most 90-day custody determinations are made well after 90 days has expired.[28] Furthermore, detainees routinely receive the subsequent six-month review long after six months has passed.[29]

In one of the most egregious examples of INS failure to perform timely custody reviews, Thanh Cao Nguyen, described above, waited over three years for

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[23] L- 64, 67 (INS letters).

[24] Memorandum from Michael Pearson, Exec. Assoc. Comm'r, Office of Field Operations, INS, "Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable" (Feb. 3, 1999), reproduced in 76 Interpreter Releases 428 (March 15, 1999).

[25] Statement by Doris Meissner, Comm'r, INS, "New Manadatory Review Policy for INS Long-Term Detainees (April 30, 1999), reported in 76 Interpreter Releases 717 (May 10, 1999).

[26] Memorandum from Michael Pearson, Exec. Assoc. Comm'r, Office of Field Operations, INS, "Interim Changes and Instructions for Conduct of Post-order Custody Reviews (Aug. 6, 1999), reproduced in 76 Interpreter Releases 1300 (August 30, 1999).

[27] L-73-74 (first custody review after two years of custody).

[28] Several documents submitted by counsel for the amici curiae and lodged with this Court have been redacted where the detainee did not want his or her identity disclosed. L-81, 86, 90 (counsel's letters to INS); L-45-46 (INS decision); L-70-71 (INS custody review worksheet).

[29] L-84, 86, 137 (counsel's letters to INS).

INS to provide any review of his custody status.[30] The INS's transferring Mr. Nguyen repeatedly around the country resulted in the INS simply losing track of him. The INS's systemic delays in providing reviews results in years of unnecessary detention of persons.

Frequently, INS provides less than half the 30-day notice required by the August 6, 1999 Pearson Memorandum to prepare for a custody review interview.[31] In other cases, the INS issues notices without a specific time or date, stating, for example, that the review will take place "on February 7 - 11, 2000 at: between 8:00 a.m. - 4:00 p.m."[32]

In addition, the INS routinely fails to provide notice to the attorney of record, which is especially prejudicial to non-English-speaking detainees since the notices it does provide are in English only.[33] The INS's failure to provide adequate notice of the reviews impedes counsel from representing their clients. By the time they do receive notice, they often have inadequate time to review their client's INS files, arrange for witnesses, obtain disciplinary records, prepare sponsorship letters, and obtain letters of support from the community.

B. INS Custody Reviews Lack Impartiality and Fairness.

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[30] L-150 (petition for writ of habeas corpus).

[31] L-20-22, 28 (INS interview notices).

[32] L-26 (INS interview notice).

[33] L-43, 68, 92 (INS decision; counsel's letter; and INS telefacsimile).

1. INS Officers Are Biased and Incompetent to Make Findings of Dangerousness.

The August 6, 1999 Pearson Memorandum requires the INS to conduct, alternately, one file review (without a detainee interview) and one interview review every six months. In practice, a lower level INS officer, generally a deportation officer, reviews the detainee's file, may conduct an interview, and makes a recommendation regarding custody. The decision whether to detain is then made by the district director or officer in charge of the facility where the detainee is housed.

As the case of Kiet Van Le Nguyen, described above, demonstrates, the INS officers responsible for conducting the custody reviews typically are biased in favor of continuing detention. The district directors then simply adopt the findings of the lower level officers. As one district court noted, "[d]ue to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community." *St. John v. McElroy*, 917 F.Supp. 243, 251 (S.D.N.Y. 1996). This failure to provide an impartial, independent decision maker deprives the detainee of the basic right to a fair, meaningful, and impartial review hearing. See, e.g., *Vo v. Greene*, 63 F.Supp. 2d 1278, 1287 (D. Col. 1999); *Phan v. Reno*, 56 F.Supp. 2d 1149, 1157-58 (W.D. Wash. 1999); *Ekekhor v. Aljets*, 979 F.Supp. 640, 644 (N.D. Ill. 1997).

Moreover, INS officers are not competent to make determinations regarding what type of dangerousness warrants continued detention under the regulations. In fact, INS officers who are not fully conversant in Spanish nevertheless routinely conduct custody review interviews in Spanish, furthering impairing their ability to make a meaningful assessment.[34] Interviewers do not include social workers, probation officers, or mental health professionals trained in the elusive criteria for predicting dangerousness.[35] See, e.g., Robert Menzies et al., *The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, 18 Law & Hum. Behav. 1, 25 (1994).

In most of the indefinite detainee cases, criminal court judges, probation officers, prison authorities, and parole administrators have made determinations about rehabilitation and dangerousness.[36] These determinations are overridden by unguided INS employees.

Often, interview "panels" consist entirely of one INS employee who is untrained in conducting interviews or documenting the results of such interviews.[37] The INS bases release decisions on recommendations from an INS officer who is typically considering only the detainee's past criminal conduct. See, e.g., *Chi Thon Ngo v. INS*, 192 F. 3d 390, 398 (3d Cir. 1999)("the petitioner in this case was repeatedly denied

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[34] L-97 (comments on proposed custody review rules).

[35] L-97.

[36] L-97.

[37] L-157-159 (habeas petition declaration).

parole by INS officials based on no more than a reading of his file that listed years-old convictions").

This lack of a trained review panel combined with the inherent agency pressures to continue detention, stacks the deck against the detainee before the review process has even begun.

2. The INS Procedures Provide No Guidance Regarding What Constitutes a Danger to the Community.

The INS regulations and memoranda lack any guidance regarding what is considered to be a danger or what level of dangerousness is required to continue detention. This leaves detainees at a loss to know what kinds of evidence and how much of it will warrant release. The INS regulations and memoranda are equally silent regarding the level of likelihood that the detainee will be dangerous and whether such danger includes danger to property as well as persons.

The failure to describe the type, magnitude, or imminence of the danger that warrants continued detention leaves the detainee with a limited understanding of how to prepare for the custody review hearing. It is inappropriate for the INS to superimpose upon the sentence already served additional confinement for an indefinite period in order to prevent the possible commission of future, undefined types of offenses. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . .").

3. Lack of Programs in Detention Prevent

Detainees from Being Able to Prove Rehabilitation.

Seven of the nine non-exclusive factors INS considers in release decisions are, in large part, related to past criminal conduct that the detainee cannot change. See 8 CFR § 241.4. Of the other two, one is "[e]vidence of rehabilitative effort or recidivism," a factor over which the detainee would, presumably, have control. However, due to the lack of available rehabilitation programs in INS detention, indefinite detainees often find it impossible to present such evidence to INS review panels.[38]

One detainee had his request to take a correspondence course at his own expense denied by jail officials.[39] Another indefinite detainee in Florida made repeated requests to enter the detention facility's drug program, but was denied admission because he was an INS administrative detainee, rather than a criminal inmate.[40] After a custody review interview, the Miami INS district director denied release, stating, "[y]ou have not presented any evidence of making efforts to rehabilitate yourself though (sic) classes or programs while incarcerated."[41]

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[38] Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, Vol. 10, No. 1(G) (Sept. 1998) at 50, 83 (hereafter "Immigration Detainees in Jails") (visited Dec. 19, 2000) <http://www.hrw.org/hrw/reports98/us-immig/index.html>; *See also,* Michael Huspek, "A Case of Cruel or Unusual Punishment," *The San Diego Union-Tribune* (Dec. 16, 1999)(describing the conditions at one INS detention center as "nothing more than a holding tank.")

[39] *Immigration Detainees in Jails* at 50.

[40] L-75-78 (inmate request form).

[41] L-53a (INS decision).

4. Limited Access to Legal Counsel Impairs Representation at Custody Reviews.

Persons in immigration proceedings have no right to appointed counsel, despite the severe consequences that may result from such proceedings. The majority of indefinite detainees go through the custody review process without legal counsel. The remoteness of many detention facilities makes it difficult for detainees to obtain counsel.[42] Even for those with attorneys, frequent transfers of detainees often prevent the attorneys from being able to represent the detainee at the custody review interview.[43] Transfers far from a detainee's home community also prevent witnesses from being able to appear at the interviews. Despite this, the INS has ignored requests by counsel not to transfer clients and regularly fails even to notify attorneys when such transfers have taken place.[44]

5. Limited Access to Information Impairs Detainees' Ability to Prepare for Custody Reviews.

Detainees frequently have limited access to the INS deportation officers who are handling their cases or to their immigration files.[45] Often detainees have no idea what information the INS is relying upon to deny

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[42] *Immigration Detainees in Jails* at 83.

[43] *Immigration Detainees in Jails* at 79-80.

[44] L-131-132 (counsel's letter to INS).

[45] *Immigration Detainees in Jails* at 5; Florida Immigrant Advocacy Center, *Florida County Jails: INS's Secret Detention World* (Nov. 1997) at 18 (visited Dec. 19, 2000)<http://www.fiacfla.org/>(hereafter "Florida County Jails").

release.[46] Where INS officers rely upon police reports and detention disciplinary records without the detainee's knowledge, detainees have no opportunity to rebut often one-sided and inaccurate information.

Detainees in local jails may be hundreds of miles from the INS officer in charge of their cases, and the INS officers routinely fail to respond to requests for information. This lack of information and communication significantly impairs the ability of detainees, or attorneys on their behalf, to prepare their cases in the custody review process. Pro se detainees are even further hampered since they are typically provided only limited access to law libraries, and these libraries often contain outdated or irrelevant materials.[47]

C. INS Custody Decisions Are Arbitrary and Lack Genuine Consideration.

1. INS Fails to Serve Detainees With Notice of Custody Decisions Within Thirty Days of Review.

The August 6, 1999 Pearson Memorandum requires the INS to serve custody decisions on detainees within 30 days of a custody review. However, many detainees wait months after the

[46] L-162-171 (*In re Lon Hoa Chau* (A-28-019-256)(8-31-00); *In re Minh Van Nguyen* (A-70-973-977)(8-23-00); *In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00); *In re Mohd Ribhe Mahmoud* (A-29-253-126)(6-12-00); *In re Chhan Khung* (A-25-362-027)(5-11-00).

[47] *Immigration Detainees in Jails* at 67.

custody review for a custody decision.[48] After INS officers make a custody decision, they may wait several more weeks before actually serving the decision upon the detainee.[49] This results in detainees sometimes receiving a denial of release within days of the subsequent six-month review.[50]

The late decisions often arrive undated and with no proof of service.[51] In some instances, the proof of service is dated well before the detainee actually receives personal service.[52] In addition, the INS consistently fails to notify the detainees' attorneys of the custody decisions.[53] Many Board of Immigration Appeals (BIA) decisions complain about the lack of proofs of service to counsel in the record on appeal.[54]

Due to the fact that detainees have only ten days to appeal an adverse custody determination to the BIA, these INS practices impede that right.[55] In one case of a detainee represented by amici, the INS transferred the man out of state shortly after his lawyer had entered an appearance for him during a custody review interview.[56] Thereafter, in the span of three months, the INS transferred the detainee four times to detention

[48] L-114-115, 120 (counsel's letters to INS).

[49] L-41-42 (INS decision and proof of service).

[50] L-19, 35 (INS notice and decision).

[51] L-29-34 (INS decisions).

[52] L-134-136 (counsel's letter to INS).

[53] L-131 (counsel's letter to INS).

[54] L-162-163, 166-167 (*In re Lon Hoa Chau* (A-28-019-256)(8-31-2000); *In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00)).

[55] 8 C.F.R. § 236.1(d)(2)(ii), (d)(3)(iii).

[56] L-131 (counsel's letter to INS).

facilities in Florida, Louisiana and Tennessee.[57] The INS never notified counsel that his client had been transferred. After requesting information about his client from an INS supervisor, the INS informed the lawyer that his client's release request had been denied, although they had no record of the decision or information about the date it was rendered.[58] The INS further informed the lawyer that they did not know of the detainee's whereabouts and referred the lawyer to the INS in New Orleans, despite the fact that the last correspondence from the detainee was from Tennessee.[59]

2. INS Headquarters' Reviews of Panel Review Decisions Are Seriously Delayed and Simply Rubberstamp the "Preliminary Decision."

The August 6, 1999 Pearson Memorandum states that all interview review "preliminary decisions" will be reviewed by INS Headquarters. However, in the experience of amici, the "Headquarter's Review" serves as nothing but a rubberstamp of the district director's preliminary decision, and further delays the "final decision" for several months.[60]

In addition, despite the fact that the INS Headquarter's review takes many months, the final decision that is served on the detainee does not include any information regarding the Headquarter's review or

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[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] L-43, 68 (INS preliminary decision and INS letter regarding Headquarters review).

findings.[61] In some cases, the final decision is simply a photocopy of the preliminary decision with the box "final decision" checked.[62]

Detainees are required to file appeals of INS custody decisions to the BIA within ten days of service of the decision. See 8 C.F.R. § 236.1(d)(2)(ii), (d)(3)(iii). The appeal form must be sent to the INS district director for forwarding to the BIA. However, the INS refuses to forward appeals to the BIA until after the Headquarter's review and final decision has been issued.[63] Thus, the Headquarter's review serves only to delay the detainee's right to appeal.

3. INS Decisions Fail to Identify Reasons for Denying Release.

The regulations state that the detainee need demonstrate only two factors to be released: 1) he or she is not a danger to the community, and 2) he or she is not a significant flight risk. 8 C.F.R. § 241.4 The regulation identifies a non-exhaustive list of factors that the district director may consider in making a determination.

Although the August 6, 1999 Pearson Memorandum requires INS district directors to weigh "favorable and adverse" factors and clearly delineate the reasons in support of a decision denying release, the decisions often state no reasons. Detainees receive cursory decisions containing such statements as: "I am unable to conclude that your release from custody is

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[61] L-36-40, 53, 57-60 (INS decisions).

[62] L-36-40 (INS preliminary and final decisions).

[63] L-69 (INS letter).

warranted at this time."[64]

The BIA has commented in numerous remands of such decisions that the INS failed to articulate any basis for concluding that the detainees should remain in detention.[65] Such decisions leave detainees with no meaningful opportunity to contest the factual accuracy and legal analysis of the factors considered or to prepare for the subsequent six-month custody review. *Matter of Daryoush*, 18 I&N Dec. 352, 353 (BIA 1982).

4. INS Ignores Detainees' Equities in Favor of Release.

The INS often impermissibly ignores evidence submitted by detainees that demonstrates strong family and community ties, work history, payment of taxes, sponsorship offers by social service agencies, employment offers, and even release plans assembled by federal and state law enforcement agencies working with social services agencies.[66]

One federal court, in finding that the INS's detention of a habeas petitioner was "arbitrary and capricious," noted the petitioner's "strong family ties, an offer of employment and a good record of complying with probation and required counseling."[67] The court ruled that the INS failed to take into full account the factors in favor of the petitioner's release in its "cursory" decision. The INS district director's

[64] L-44, 61-62 (INS decisions).

[65] L-166-168, 170-171 (*In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00); *In re Chhan Khung* (A-25-362-027)(5-11-00)).

[66] L-125 (counsel's letter to INS).

[67] L-178 (Order, U.S. District Court, S.D.Fla. CIV-00-3262 (11-2-00)).

decision stated simply that due to the detainee's conviction the INS was "unable to conclude that you established by clear and convincing evidence that you do not pose a threat to society as well as a flight risk if released."[68]

5. INS Makes Boilerplate Findings of Dangerousness or Flight Risk.

The failure of the INS to provide any real consideration of the individual factors in detainee custody reviews is most evident in its practice of issuing boilerplate decisions finding that the detainee is a danger to the community or a flight risk. The BIA repeatedly has remanded custody decisions criticizing the district directors' issuance of "generic" form letters that contain nothing more than a summary of the detainee's criminal history - a factor which the detainee cannot change.[69]

In some of the more egregious cases, the decisions denying release actually pre-date the custody reviews.[70] The haste with which the INS considers detainees' cases results in decisions plagued with serious and significant factual errors. In finding that the INS had abused its discretion in reviewing the case of a Cuban detainee in Miami, a federal court noted that the INS decision mistakenly listed the commission of the detainee's crime seven years later than it had occurred, indicated that the detainee's record "reflects

[68] *Id.*

[69] L-162-167 (*In re Lon Hoa Chau* (A-28-019-256)(8-31-00); *In re Minh Van Nguyen* (A-70-973-977)(8-23-00); *In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00).

[70] L-24, 25, 54, 55 (INS notices of review and decisions).

disciplinary problems" though none were identified, and stated that no probation history or prison disciplinary records were available despite the detainee's contention that he had successfully completed probation, had a perfect court appearance record, and no disciplinary problems.[71]

Other cases have been remanded by the BIA because the decision finding dangerousness and flight risk "merely lists the respondent's criminal convictions and concludes that the respondent is a danger to society."[72] Federal courts have granted habeas relief on the basis that such decisions violate procedural due process. *Duong v. INS,* Case No. 99 CV1965-J (S.D. Cal. Mar. 17, 2000) at 1067. Such decisions eternally condemn persons to detention for a criminal history that can never be erased. *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3rd Cir. 1999)("Due process is not satisfied. . . by rubberstamp denials based on temporally distant offenses.")

II. THE INS PROPOSED RULES FAIL TO ADDRESS THE DEFICIENCIES IN THE CUSTODY REVIEW PROCEDURES.

The proposed rules, published on June 30, 2000, regarding post-final order custody reviews simply codify the same procedures outlined in the INS memoranda that have failed to guarantee procedural protections to detainees.[73] However, the proposed

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[71] L-191, 192 (Order, U.S. District Court, S.D.Fla. CIV-00-0046 (8-24-00).

[72] L-168 (*In re Mohd Ribhe Mahmoud* (A-29-253-126)(6-12-00)).

[73] 65 Fed. Reg. 40540-48 (June 30, 2000).

rules further erode the minimal protections under current procedures by eliminating BIA review of INS decisions. Under the proposed rules, only INS Headquarters officials will review the custody decisions of INS district directors, thereby completely insulating the review process.

The BIA repeatedly has found that INS officials abused their discretion in inconsistent and arbitrary decisions to continue detention.[74] The INS has demonstrated that it is incapable of acting in a fair, neutral manner when interpreting custody regulations and making release decisions. For over a year, the INS denied detainees the right to appeal custody decisions if the INS had rendered the decision prior to the detainee's submitting a formal, written request for review.[75] The practice only stopped when the BIA ruled that there was no such requirement in the regulations. *See In re Saelee*, Int. Dec. #3427 (BIA 2000). The proposed rules eliminate detainees' sole right to an outside review of INS decision-making.

The proposed rules also fail even to mention any types of alternatives to INS detention facilities, prisons and local jails, despite the fact that studies contracted by the INS clearly demonstrate that there are other cost effective options that could also accomplish protection of the community.[76] The proposed rules, therefore,

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[74] L-97 (comments on proposed custody review rules).

[75] L-79 (Office of Immigration Litigation letter).

[76] *"Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program,"* (2000 Report)(visited Dec. 19, 2000) <http://www.vera.org/aap/index.html>; *See also, Needless Detention* at 26-27.

codify the most extreme form of restraint on the alien's liberty as the only option.

Finally, the proposed rules' transfer of final custody review decision-making authority to INS Headquarters adds no procedural protections. Rather, as the reviews by INS Headquarters have already demonstrated, such a transfer of authority serves only to further delay detainees' custody decisions and to rubberstamp district director decisions.

III. THE UNFAIRNESS OF THE CUSTODY REVIEW PROCESS SUBJECTS PERSONS TO TREATMENT MORE HARSH THAN CRIMINAL INCARCERATION.

A. Persons in Administrative Detention Are Treated Worse Than Criminals.

Although INS detainees are in administrative -- as opposed to criminal -- detention, they are held in local jails, prisons, and prison-like detention centers, many of which are not designed for long-term detention. The facilities include nine "service processing centers" operated by the INS,[77] four contract facilities operated by private corporations,[78] several

[77] These service processing centers are located in Aguadilla, Puerto Rico; Buffalo, New York; El Centro, California; El Paso, Texas; Florence, Arizona; Miami, Florida; Los Fresnos, Texas; San Pedro, California; and New York, New York.

[78] INS has contracts with Wackenhut and Corrections Corporation of America to hold INS detainees in Aurora, Colorado; Houston, Texas; Seattle, Washington; Laredo, Texas; and Elizabeth, New Jersey.

Bureau of Prisons facilities,[79] and hundreds of county and city jails.[80] The majority of INS detainees are held in state and local jails under contract agreements with the U.S. government.[81]

In the experience of the amici, the treatment of their clients in INS custody is often particularly harsh and significantly interferes with their ability to obtain fair custody reviews. This experience is matched by the reports of human rights organizations, as well as other branches of the Justice Department, regarding detention conditions. On March 30, 2000, the Civil Rights Division of the U.S. Department of Justice issued findings in its investigation of conditions at the Jackson County Correctional Facility in Florida.[82] INS detainees were held at this county jail until 1998, when detainees reported that jail personnel had severely mistreated them by excessive use of an electronic or "stun" shield, as well as a four-point restraint that involved strapping a detainee's wrists and ankles to a cement block platform. The report supported the detainees' allegations, concluding that the facility was deficient in the areas of "access to counsel, medical and mental

[79] These facilities are principally in Oakdale, Louisiana and Eloy, Arizona.

[80] *Immigration Detainees in Jails* at 16.

[81] Detention in state and local jails is accomplished through intergovernmental service agreements (IGSAs) between the INS and local governments, or between the Federal Marshals Service and local governments, with INS "piggy-backing" on to the agreements. Often, private corporations operate the local and state facilities. *Florida County Jails* at 6.

[82] L-1-19 (Letter from Acting Assistant, Attorney General, Civil Rights Division to Chair, Board of County Commissioners, Jackson County (Mar. 30, 2000))(hereafter, "Dept. of Justice Letter").

health care, use of force, security and protection from harm, fire safety and lack of exercise."[83]

In 1998, Human Rights Watch issued a detailed report that found that INS does not ensure "humane conditions and treatment" in the local jails that hold INS detainees.[84] Medical and dental care often is substandard; detainees have limited access to legal representatives, family and friends; and language barriers prevent jail staff from communicating with INS detainees. Recently, the Women's Commission for Refugee Women and Children issued a report on conditions at the Krome Service Processing Center in Miami, Florida. The report describes incidents of sexual abuse of women detainees by Krome officers, limited access to counsel, inadequate interpretation sources, a lack of recreation and educational opportunities, and inferior health care and hygiene.[85]

B. INS Long-Term Detainees are Often Held in Remote Locations, Transferred Frequently, and Have Difficulty Gaining Access to Counsel.

INS holds its detainees wherever space is available, without regard to location of the detainees' families or the availability of pro bono or private legal counsel.[86] Many of the facilities in which INS detains

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[83] *Id.* at 2.

[84] *Immigration Detainees in Jails* at 5.

[85] Women's Commission for Refugee Women and Children, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center* (Oct. 2000) (hereafter, "*Behind Locked Doors*"), http://www.theirc.org/wcrwc/reports/wc_krome_10.00.html.

[86] *Immigration Detainees in Jails* at 18 and 64.

individuals are in remote locations.[87] INS compounds the effect of isolation by frequently transferring detainees, often across state lines.[88] As a consequence of the frequent transfers, detainees often lose their personal property, including legal papers and documents needed to support their cases for release.[89]

Access by attorneys to INS detainees is also a persistent problem.[90] For example, at Krome Service Processing Center in Miami, one of the largest INS detention centers, overcrowding results in attorneys having to wait hours for clients to be brought to the visitation area. More important, attorney-client conversations can easily be overheard by INS staff. There are not enough visitation booths, and they are too small to accommodate both an attorney and interpreter.[91] Access to counsel is further hampered by telephone and mail restrictions and other bureaucratic impediments to attorney visitation.[92] All of these factors greatly impede the ability of attorneys to adequately prepare detainees for reviews of their custody status.

C. The Punitive Nature of INS Detention Impairs Detainees' Ability to Seek Release.

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[87] *Immigration Detainees in Jails* at 64.

[88] *Immigration Detainees in Jails* at 79-81.

[89] *Immigration Detainees in Jails* at 50-51.

[90] *Immigration Detainees in Jails* at 63.

[91] *Behind Locked Doors* at 16-17.

[92] *Immigration Detainees in Jails* at 66-67; L-128-130 (counsel's letter to Coleman Prison Warden).

In the experience of amici, many INS detainees suffer from harm and excessive use of force at the hands of INS guards and local jail personnel. After calls for an investigation of INS detainees at a Jackson County, Florida jail, the Civil Rights Division of the Department of Justice found that jail officials "engage in excessive and unwarranted use of restraints to control inmates, causing serious risk of bodily harm."[93]

Human Rights Watch has reported allegations of excessive disciplinary sanctions and mistreatment of INS detainees at three local jails. One incident involved a detainee who was taken to solitary confinement after he said he was going to file a complaint against certain jail officials. The detainee was handcuffed, then hit and kicked in the head and arms by four jail officers.[94] Most recently, the Women's Commission for Refugee Women and Children issued a report describing incidents where female detainees at Krome Service Processing Center in Miami, Florida were sexually harassed and abused by INS personnel.[95]

INS detainees are often subjected to arbitrary or excessive disciplinary sanctions.[96] Segregation is often used punitively and sometimes for transgressions resulting from mental illness or language difficulties. Records of these types of sanctions are then used against detainees during custody reviews.

No meaningful grievance procedures exist, and

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[93] L-9 (Dept. of Justice Letter).

[94] *Id.*

[95] *Behind Locked Doors* at 7-9.

[96] *Immigration Detainees in Jails* at 69.

some detainees have been threatened with transfer if they ask to file a grievance.[97] Detainees' detention and disciplinary records often present one-sided, exaggerated, and even false versions of events.[98] Detainees' explanations and attempts to correct their records during custody reviews are summarily dismissed.[99] The hopelessness and despair detainees experience is reflected in the frequent hunger strikes and suicide attempts.[100]

D. No Enforceable Standards Govern INS's Treatment of Detainees.

No statutory provision governs the INS's treatment of its detainees. The only applicable regulatory provision provides minimal detention standards, namely 24-hour supervision, conformance with safety and emergency codes, food services, and the availability of emergency medical care. 8 CFR § 235.3(e).

On November 13, 2000, as a result of advocacy efforts led by the American Bar Association, the INS announced the issuance of written standards for facilities housing INS detainees, which address such issues as attorney access and the availability of legal materials.[101] However, the INS refused to issue the

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[97] *Immigration Detainees in Jails* at 72; Florida Immigrant Advocacy Center, Inc., "*Krome's Invisible Prisoners: Cycles of Abuse and Neglect*" (July 1996) at 26 (visited Dec. 19, 2000) <http://www.fiacfla.org/>.

[98] L-123-125 (counsel's letter to INS).

[99] *Id.*

[100] *Needless Detention* at 2.

[101] *Detention Operations Manual* (visited Dec. 19, 2000) < http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm>.

standards as enforceable regulations. In addition, the standards do not take effect immediately in state and local jails where most detainees are kept. They do not mandate rehabilitation programs or the provision of other than collect-call telephones for detainees. Most important, the rules fail to address the serious problem of constant detainee transfers around the country and the lack of notice to counsel of such transfers.

CONCLUSION

For the above stated reasons, counsel for the *amici curiae* respectfully urge that the decision of the Court of Appeals of the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX A

ORGANIZATIONAL STATEMENTS OF INTEREST

The American Immigration Law Foundation (AILF)

AILF is a nonprofit organization established in 1987 to increase public understanding of immigration law and policy, promote public service and professional excellence, and advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration.

The American Immigration Lawyers Association (AILA)

AILA is a national nonprofit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 6,000 members organized in 34 chapters across the United States and in Canada. AILA's members clients are directly affected by the decision in this case.

Lawyers' Committee for Civil Rights Under Law of Texas

The Lawyers' Committee for Civil Rights is part of a national network of nonpartisan, nonprofit law firms founded in 1963 to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and

preserving civil rights for immigrants and refugees throughout the state. Immigration detention is a high priority of the Lawyers' Committee. In particular, the Lawyers' Committee is very concerned about the indefinite detention of immigrants under a final order of deportation, and its lawyers have represented dozens of these individuals in administrative custody reviews before the INS.

APPENDIX B

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